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N. M. ANDRUCHOW,
Appellee,

vs.

WESTERN UNION TELEGRAPH CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 611

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendant for \$250, from which defendant appeals.

The amended statement of claim alleges that in October, 1919, plaintiff deposited with the defendant, at its office in Chicago, \$250, which defendant agreed to forward to one Mikolaj Warwara Andruchow, Galicia, Austria, by a written contract which is set out in full; that it was the duty of defendant "to use all reasonable diligence to transmit said money to said payee, but the said defendant failed to use reasonable care and diligence to transmit the money, and has not transmitted the same or any part thereof to the payee," and has refused to return the same, but offered to return the sum of \$1.43.

The contract so set forth contains the following stipulations: "In the case of a foreign order, the foreign equivalent of the sum named in the order will be paid at the rate of exchange established by the company or its agents on the date of the transfer. When the company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable

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WESTERN UNION TELEGRAPH CO.,
CHICAGO, ILL.
JAN 11 1893

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RECEIVED THE OFFICE OF THE COURT
JAN 11 1893

Plaintiff recovered a judgment against defendant
for \$200, from which defendant appeals.
The amount of judgment is claimed to be \$200.
October, 1910, plaintiff recovered from the defendant, as the
office in Chicago, \$200, which defendant agreed to return to
one Nikolai Petrovich Petrov, a Russian, by a written
contract which is not in this; that it was the duty of de-
fendant to use all reasonable diligence to procure this money
to said party, but the said defendant failed to use reasonable
care and diligence to procure the money, and has not trans-
mitted the same or any part thereof to the party, and has
refused to return the same, but offered to return the sum of
\$1.00.

The contract on file herein contains the following
provisions: "In the case of a foreign order, the foreign
equivalent of the sum named in the order will be paid at the
rate of exchange established by the company or its agents on
the date of the transfer. When the company has no office at
destination sufficient to pay money, it shall not be liable for
any default beyond the sum named, but shall be the agent of the
sender, without liability, and without further notice, to re-

line, bank or other medium, for the further transmission and final payment of this order."

To this statement of claim, the defendant filed an affidavit of merits admitting the receipt of the money and the making of the contract as claimed by the plaintiff, and alleging that "Gallicia, Austria," had become part of the Republic of Poland; that defendant had no office there and therefore, pursuant to its agreement with plaintiff, it paid said \$250 to the Irving National Bank of New York, and "contracted with said bank as plaintiff's agent for the transmission and final payment of said sum to the payee named in said contract, using all care and caution in the choice of such forwarding agent;" that ^{on} the day the contract was made, the foreign equivalent of \$250, at the then current rate of exchange, was 7143 Polish marks, and the Irving National Bank, "pursuant to the contract," converted said sum of \$250 into 7143 Polish marks, credited its correspondent in Gallicia with the same, and advised such correspondent to pay the same to the payee named in the contract; that two years later the bank returned said marks to the defendant, advising it that the payee named in the transfer message could not be found, whereupon defendant tendered to the plaintiff \$1.43, the value of said marks at that time, which plaintiff refused to accept.

There is no dispute as to the facts. Plaintiff introduced no evidence in chief, but relied on the admissions made in the affidavit of merits. The defendant then proved the facts stated in its affidavit, and also that during the time which elapsed between the deposit of the money and the tender it made two years later, "conditions in Poland were chaotic, the land was war-swept, and people moved from point to point and were driven by marauders;" that "every effort was made to make payment," but

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the payee was not to be found; that the postoffice Department was called upon to assist in locating him, and that the Irving bank had two special agents engaged for many months "in clearing up such cases." In rebuttal, the plaintiff, over the objection of defendant's counsel, testified that when the money was first deposited, the defendant's local agent told him it would be delivered in sixteen or eighteen days and that the agent would let him know when it was delivered; that he waited twenty days and then asked the agent for information, and that he called at the agent's office many times thereafter, but that the agent "never told him he would have to take the matter up with the Irving National Bank."

On this record, the judgment is clearly erroneous. The only cause of action alleged in the plaintiff's statement of claim is the alleged negligence of defendant in failing to use reasonable care to transmit the plaintiff's money in accordance with the terms of the written contract. The proof does not show there was any such negligence. On the contrary the proof shows, without contradiction or dispute, that defendant immediately turned over the money it received from the plaintiff to a National bank in New York and contracted with it, on behalf of the plaintiff, for the further transmission and final payment of the same to the payee in Galicia. This is exactly what defendant agreed to do, and what the written contract permitted and required it to do, since it had no office in Galicia.

Being met with this complete defense to the cause of action stated, plaintiff shifted his position and introduced the rebuttal evidence above stated, evidently upon the theory that defendant was guilty of negligence in failing to notify the plaintiff of what it had done, and that the Irving National Bank was unable to find the payee in Poland during the war in that Republic.

THE COURT HAS NOT TO BE DECEIVED BY THE APPEARANCE OF THE
PARTIES WHOSE INTERESTS ARE IN ISSUE, AND WHOSE RIGHTS ARE
AT STAKE. THE COURT MUST BE SURE THAT THE PARTIES ARE
WHO THEY CLAIM TO BE, AND THAT THEY ARE THE ONLY PARTIES
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That, however, is a different cause of action from the cause of action alleged in the statement of claim, and no amendment was made or requested by the plaintiff. Such rebuttal evidence was wholly inadmissible under the pleadings.

For the reasons stated, the judgment is reversed, and, the cause having been tried without a jury, a finding of facts will be made in the judgment of reversal.

REVERSED WITH A FINDING OF FACTS.

Barnes and Gridley, JJ., concur.

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FINDING OF FACTS TO BE INCORPORATED IN THE JUDGMENT.

The court finds that the defendant was not guilty of the negligence alleged in the plaintiff's statement of claim.

Received of Mr. J. H. [illegible] the sum of \$10.00

for [illegible] [illegible] [illegible] [illegible] [illegible]

and for [illegible] [illegible] [illegible] [illegible] [illegible]

UP-TO-DATE MACHINE WORKS,
a Corporation,

Appellant,

vs.

F. V. STEWART MFG. CORP.,
a Corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 611²

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

From a finding and judgment against the plaintiff in an action on contract in the Municipal court, the plaintiff appeals.

Plaintiff's claim is for the contract price of 9345 "cones" specially manufactured by the plaintiff for the defendant, which the plaintiff refused to receive. The "cones" are otherwise referred to in the evidence as "roller bearings," and appear to be speedometer parts. The defenses stated in the affidavit of merits are that none of said cones was manufactured after June 12, 1919, on which date, defendant claims, "all contracts and orders" for cones were cancelled by agreement, and that on November 4, 1921, defendant paid plaintiff the sum of \$661.43 "in full settlement of all accounts up to and including said date, and that as part of said settlement it was agreed between the parties that all contracts and orders of every kind and character prior to said date be cancelled."

In the original brief of plaintiff's counsel, the evidence is fully discussed and it is there contended that the judgment should be reversed on the evidence and a finding and judgment entered in this court for the amount claimed, viz: \$693.38. In their reply brief, however, they insist that "the only issue on this appeal" is whether a proposition of law submitted

by the plaintiff, and which was refused by the trial court, correctly states the law applicable to the facts proved, and if it does, that the cause be remanded for a new trial. We have considered the case upon both theories, and have reached the conclusion that the position taken in the reply brief is correct.

On February 26, 1919, defendant gave an order to the plaintiff for the manufacture of 50,000 small cones and 50,000 large cones, at one price, "if made from mill shipment stock," and at a higher price if made from other specified stock. Plaintiff at once began manufacturing the cones, and in June, following, had completed, with the exception of "a little milling," the manufacture of approximately 20,000 of the small cones, when defendant's president asked the plaintiff to cease manufacturing, and to cancel the order for the cones. Conversations followed, resulting in a new contract being made. This took the form of a letter from defendant to the plaintiff, reading as follows:

"In accordance with our understanding, we are giving you the order for 25,000 parts for the swivel joints and you are to cancel our specifications for parts for the roller bearing and only manufacture these particular items for us as we may require them. If our volume of business does not justify your keeping the steel purchased for the roller bearing contract beyond a six months' period, then in that event we are to take the balance of the steel off your hands at the cost price."

This letter was marked "Accepted" by the plaintiff.

There is a dispute between the parties as to its meaning. Nothing is said in it regarding the 20,000 cones already manufactured under defendant's "specifications." Hence plaintiff was permitted to introduce oral and documentary evidence as to the circumstances under which the new contract was made, and as to what was said leading up to the "understanding" referred to in the letter above quoted, some of which evidence was contradicted by other evidence introduced by defendant. We express no opinion as to the weight of

this evidence, but all of it was competent, we think, to explain the latent ambiguity shown to exist and thereby enable the court to give effect to the real intent of the parties.

(Boyle v. Teas, 4 Conn. 302, 354; Weber v. Adler, 311 Ill. 347, 351.)

In February, 1920, plaintiff wrote to defendant asking it to take away the cones already manufactured, offering to make a reduction in the price, if defendant could use them "as they are." Defendant then replied that the letter of June 12, 1919, "cancelled all orders," to which plaintiff immediately rejoined, by mail, that the letter only cancelled that portion of the order which had not been manufactured, and insisted it was so understood at the time. Soon after, defendant sent an order to plaintiff to ship 3750 of the cones at the agreed price. In July, 1920, defendant inquired, by mail, how many small cones plaintiff would have on hand after the last mentioned order was completed, to which the plaintiff replied that it had "3990 left-hand cones threaded, and 9660 right-hand threaded, after deducting your order." Some of these were afterwards taken by defendant at a reduced price; the remainder were refused.

Meantime, the work of filling the contract for parts for swivel joints was going on. Changes were ordered, and disputes arose as to the work, which continued until November 4, 1921. On that day bills were presented by plaintiff to defendant for approximately \$1000 for manufactured parts for the swivel joints. Defendant approved the bills, "except \$103 and some cents" included for rejected parts. Thereupon, that amount was deducted from the bill, and the balance, \$891.43, was paid by defendant giving its two trade acceptances for that amount. The following written statement was then signed by both parties:

The following table shows the results of the survey conducted in the year 1910. The table is divided into two main sections, one for the year 1910 and one for the year 1911. The first section, for the year 1910, is divided into two sub-sections, one for the first half of the year and one for the second half. The second section, for the year 1911, is divided into two sub-sections, one for the first half of the year and one for the second half. The table shows the number of cases of disease, the number of deaths, and the number of recoveries for each of these categories. The data is presented in a clear and concise manner, making it easy to understand the results of the survey.

"In consideration of the two trade acceptances totaling \$391.43 herewith acknowledged, it is thoroughly understood that this settlement pays all invoices, liquidates the purchases of all material which we made on orders, cancels all contracts and orders, and completes every and all business transactions which we have had, balancing the account in an entirely satisfactory manner."

The parties disagree as to whether this agreement was intended to include and settle the old dispute regarding the cones, or merely the amount due for parts for swivel joints, and oral evidence was admitted as to what was said at the time on that subject. As before, the witnesses disagreed. We think this evidence was also competent for the same reason. (Firs Insurance Association v. Wickham, 141 U. S. 564.)

At the close of all the evidence, plaintiff submitted a proposition of law, which the court refused. It states, in substance, that if, on November 4, 1921, defendant admittedly owed the plaintiff the sum of \$391.43, and defendant executed and delivered to the plaintiff trade acceptances for that exact amount, and the parties then entered into the agreement last above quoted, such agreement "did not in law constitute a release by the plaintiff of the defendant from any liability other than that represented by said admitted indebtedness."

We are of the opinion that the court erred in refusing this proposition. It seems clear from the evidence that the two contracts were distinct and separate matters not connected in any way one with the other, except that they were between the same parties. Defendant "admittedly owed" \$391.43 for manufactured parts for swivel joints. There was never any dispute as to that amount being due. The dispute, if any, arose out of the claim of defendant that proper credit had not been given for certain rejected parts, aggregating about \$103, and when that was conceded and deducted by plaintiff, the payment of the remainder was a payment of an undisputed and liquidated claim. The payment of such an amount,

the Commission is not a body of experts, but a body of laymen, and it is not its function to make technical decisions. It is the function of the Commission to make decisions on the basis of the evidence presented to it, and to make recommendations to the Government on the basis of its findings.

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admittedly due on the contract for swivel joints, would not constitute a valid consideration for a release of the amount claimed to be due under the distinct and separate contract for cones.

Furthermore, it is the general rule that where a release contains a recital of a particular matter or consideration, and such recital is followed by general words of release from all demands, the general words will be restrained and qualified in their effect by the preceding particular recital in the instrument. (*Todd v. Mitchell*, 168 Ill. 129; *Bassett v. Lawrence*, 193 Ill. 494; 8 L.R.A., N.S. 1034, note.) In the case of *Chicago Union Traction Co. v. O'Connell*, 324 Ill. 428, it was held that this rule does not apply where the general words come first in the instrument; but the alleged release here in question comes under the general rule stated, and not the exception. The evidence shows that the trade acceptances recited in the first clause as the consideration for the agreement, were acceptances given for the agreed amount due upon the contract for swivel joints; and therefore, under the rule stated, the general words of release which follow are qualified by and limited to the particular matter so recited in the instrument.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

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HYMAN BROTHERS, a
corporation, et al.,
Appellees.

vs.

INTERNATIONAL LADIES GARMENT
WORKERS' UNION, et al.,
Defendants.

IN THE MATTER OF THE CONTEMPT
OF ROY NICHOLS,
Appellant.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

238 I.A. 611

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Roy Nichols from an order of the Superior court adjudging him and three other persons guilty of contempt of court and committing them to jail for six months for violating an injunction issued in the case of Hyman Brothers, et al. v. International Ladies Garment Workers' Union, et al.

The bill in that case alleges that on February 27, 1924, the defendants therein named had instituted a general strike of union garment workers employed by complainants and other manufacturers of ladies' dresses, had caused their premises to be picketed and their other employees threatened, had congregated in large numbers upon the streets and sidewalks, had prevented buyers and others from entering their premises, and in other ways had interfered with their business. A temporary injunction was issued, which, among other things, restrained the defendants, their officers and agents, from picketing, from attempting, by threats, intimidation, force, violence or coercion, to induce persons not to enter into, or continue in, the employment of the complainants, from injuring or attempting to injure the property of the complainants, or property used by them in the operation of their

TABLE 1

THE UNIVERSITY OF CHICAGO
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(continued from page 6)

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CONFIDENTIAL

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business, and from advising, encouraging, or assisting in the doing of any of such things. Copies of this injunction were posted upon the front and rear entrances of the premises of each of the complainants.

The complainants' places of business were then on Market street, near Jackson boulevard, Chicago, near the center of a district in which many manufacturers of ladies' dresses and skirts were located. Against all of these a general strike had been declared. During its progress, and prior to May 8, 1924, as many as fifteen so-called "stink-bombs" were thrown in the district at and upon the premises of different manufacturers, and additional police had been detailed to apprehend the bomb throwers.

A little after midnight on May 9, 1924, a police officer, standing under the elevated railroad on Market street, near Jackson boulevard, found a broken bottle containing a brown liquid with a sickening odor, which appeared to have been thrown from an elevated train, striking the fire escape on a building at 322 South Market street, which adjoins and is between the places of business of two of the complainants. About an hour and a half afterwards, the same officer saw three men throwing similar bottles at a window of 312 Jackson boulevard, which is within a block of 322 South Market street. The officer chased them, and fired a shot in the air, but they escaped in a Checker taxicab, which was waiting for them around the corner on Franklin street. This was reported to police headquarters and a "crime squad," consisting of a sergeant and three police officers, began touring the district in an automobile. About 5:30 o'clock in the morning, they met a Checker cab going south on Franklin street, north of Jackson boulevard. They called on the driver to halt and when he did not stop at once they turned and pursued him a short distance, overtook and stopped him. During this short pursuit, four glass bottles, filled with the same kind of foul-smelling liquid, were thrown out of the cab. One of them,

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unbroken, was recovered by the police and used in evidence. The occupants of the cab were the four respondents and they were arrested and taken to the police station. The officers testified that all of them appeared to be stupified or intoxicated. On the floor of the cab a broken bottle was found, the odor from which was described by one witness as "not a human smell at all," and the fumes were such that he was nearly overcome by them.

The same day, two affidavits were filed in the injunction proceeding in the Superior court. In one of them, Louis A. Rubin, one of the complainants, alleged that when he arrived at his place of business, 324 South Market street, on the morning of May 9, 1924, he found that at least two bottles, containing a foul-smelling liquid, had been thrown, evidently from the fire escape, through the window into his work shop, destroying some of his manufactured goods. The other affidavit was by one of the police officers who arrested Nichols and his companions. It related the facts above stated regarding their arrest, their attempt to get away, and the throwing out of four stink-bombs as they started away. Thereupon, a writ of attachment was issued and a rule entered against them to show cause why they should not be adjudged guilty of contempt for violating the injunction issued in said cause. They filed a joint answer stating that they hired the taxicab, in which they were riding, about ten minutes before they were arrested, denied "throwing any stink-bombs" and denied all knowledge of the existence of the injunction. The evidence developed the facts above stated.

It is contended by appellant's counsel (1) that the record "discloses the absence of what constitutes any charge in a legal sense;" (2) that the findings of fact are not supported by the evidence, particularly as to any knowledge or notice by the respondents of the injunction order; and (3) that the court was without jurisdiction.

It is suggested that the following be included in the report of the Commission on the subject of the proposed amendments to the Constitution of the United States:

- (1) That the Commission should be authorized to hold public hearings on the subject of the proposed amendments to the Constitution of the United States.
- (2) That the Commission should be authorized to hold public hearings on the subject of the proposed amendments to the Constitution of the United States.
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- (9) That the Commission should be authorized to hold public hearings on the subject of the proposed amendments to the Constitution of the United States.
- (10) That the Commission should be authorized to hold public hearings on the subject of the proposed amendments to the Constitution of the United States.

The first and third of these contentions relate wholly to the form of the accusation and may be considered together. It is conceded by counsel that a proceeding of this character involves only what is known as a civil contempt. Both sides cite, and apparently rely upon, the decision to that effect in Hake v. The People, 230 Ill. 174. In the opinion filed in that case, it is said (p. 192): "From the foregoing review of the authorities in this State the following rules applicable to civil contempt may be deduced: Such proceedings may be commenced by petition or affidavit filed in the court having jurisdiction of the cause wherein the order was entered, the violation of which forms the basis of the contempt proceedings; whether commenced by petition or affidavit, the alleged contempt need not be set out in the petition or affidavit with the same particularity as is required in a criminal information or indictment, the rules in this regard applicable to other chancery pleading will control." In the present case, the proceeding was begun by the filing of affidavits, the respondents were ruled to show cause why they should not be punished for contempt for violating the injunction "as alleged in the affidavits," and their answer asserts that they had no knowledge of the existence of any injunction "which they are charged with violating." The last quotation shows that before their answer was filed, the respondents fully understood the nature of the charge against them and that they were accused of violating the injunction which had been issued in the case mentioned. The record also shows they were given every reasonable opportunity to meet such charge. This is all that is required in such cases, according to the later decisions. The ancient and extremely technical procedure mentioned in Parsons v. The People, 51 Ill. App. 467, is not in accord with the modern practice as outlined in the later case of Hake v. The People, supra. The court had jurisdiction of the subject matter and of the persons of the respondents and we are unable to see that

any substantial right of appellant was infringed or overlooked in the procedure that was adopted.

There remains for consideration only the question whether the evidence justified the findings of the court as to the violation of the injunction, and as to notice to appellant, or knowledge by him, of the issuance of the injunction. There is no direct proof that appellant and his companions threw the bomb which injured the property of the complainant Rubin, nor any direct proof that appellant had any knowledge of the injunction that was issued in complainants' behalf. But while the evidence in support of the findings of the court as to these matters is wholly circumstantial, it is, nevertheless, convincing.

Appellant and his co-respondents denied that they were caught with stink-bombs in their possession; but the evidence to the contrary is overwhelming. They did not attempt to explain such possession; they contented themselves with denying that such was the fact. The evidence shows that after they were arrested the bomb throwing ceased in that district. There was evidence tending to prove that after the arrest appellant was in communication with the defendant Union. The respondents were not strikers or employees of any of the concerns involved in the strike, but the evidence justifies the inference that they were hired by some of the defendants in the chancery suit to throw the bombs for the purpose of intimidating and annoying the complainants and injuring their property and business. The history of the bomb-throwing attacks, the presence of appellant and his companions in that vicinity at five o'clock in the morning, a few hours after the last attack, with similar bombs in their possession, their attempted flight and attempted destruction of the evidence in their possession, their failure to give any reasonable explanation for their presence in that district at that time and under such circumstances, their absurd denial, in the face of overwhelming evidence, that they

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had any bombs in their possession, and the complete cessation of bomb throwing in the district in question after their arrest, present a connected chain of facts and circumstances that cannot be explained upon any reasonable theory other than that of the guilt of appellant as charged. If he was guilty of throwing the bombs or of participating in such throwing, he must have seen the copies of the injunction posted upon the premises of the complainants, even if he did not see the newspaper accounts of the disorders and bomb throwings which marked the progress of the strike. In the reply brief, his counsel go to the length of suggesting that the driver of the Checker cab was the only one who knew anything about the bombs and that the police "faked" the evidence regarding appellant's communication with the headquarters of the defendant Union. Neither of such suggestions is supported by any fact or circumstance in evidence.

For the reasons stated the judgment of the Superior court is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

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C. H. CALDWELL,
Appellee,

vs.

M. C. ANSON,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 611⁴

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in forcible detainer. The case was tried before a jury. At the close of all the evidence, each of the parties asked for a directed verdict in his favor. The court granted the motion of the plaintiff, and denied that of the defendant. The evidence was conflicting upon the question whether any notice or demand for possession had been served upon the defendant before bringing the suit. This was a question of fact, and while there was evidence from which a jury might find for the plaintiff on that issue, there was also evidence from which the jury might reasonably find the contrary. It was therefore error for the court to direct a verdict for the plaintiff. (Balsaviez v. C. R. & G. R. R. Co., 240 Ill. 338, 244.)

It is contended by counsel for the plaintiff that no notice or demand was necessary under the facts in this case. The premises in question consist of two lots improved with a three-story brick and stone building. On the first floor there are two stores, one of which is used by defendant. Above the stores are four flats of seven rooms each. All are vacant except one, which is occupied by the defendant. The premises were owned in 1920 by one Charles T. Hordeck, who mortgaged the same and failed to pay the mortgage. Foreclosure proceedings

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THE UNIVERSITY OF CHICAGO

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were instituted and a sale of the premises under the foreclosure decree was made on August 17, 1930, and there was a deficiency decree of \$926.67. A receiver had been appointed pending the hearing of the foreclosure suit, who was continued during the period of redemption. The defendant attorned to the receiver and paid rent to him. On December 30, 1931, a master's deed was issued to Walter D. Harris, assignee of the master's certificate of sale, and Harris quitclaimed to the plaintiff. In the present forcible detainer suit, the defendant undertook to set up an adverse claim of title, to-wit, that Harris had agreed (whether orally or in writing is not clear) to convey to defendant a half interest in the property on certain conditions, and that Harris failed to keep his agreement. Manifestly, such a claim, if proved, would be no defense in this proceeding, if the plaintiff made the statutory demand for possession, and plaintiff's counsel contends that as the defendant was once a tenant of the receiver and had "repudiated such tenancy" by claiming title in himself, such action on his part dispensed with the necessity of a formal demand or notice of any kind, citing McLinnia v. Fernandes, 136 Ill. 328, and similar cases.

The principle contended for is well settled, but it applies only to cases where the relation of landlord and tenant or some other contractual relation has existed between the plaintiff, or his grantor, and the defendant, and the latter repudiates his contract and denies the owner's title. (26 L. R. A. N. S. 104, note.) In this case, there never was such a relation. By his attornment, defendant became the tenant of the receiver and the decree recites that he had no other interest in the property. But that tenancy expired with the receivership. The purchaser at the foreclosure sale did not thereby become defendant's landlord and when the master's deed was made to Harris, the latter acquired the title of the mortgagor but took nothing from the receiver, nor did he

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THE UNIVERSITY OF CHICAGO
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DEPARTMENT OF CHEMISTRY
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succced to any contracts made by him. The receivership was ended long before this suit was brought, and defendant never attorned to the plaintiff or the plaintiff's grantor, Harris, nor in any other way recognized either as his landlord. As between the parties to this action, the defendant does not occupy the position of a former tenant who, when sued as such tenant, denies his landlord's title by setting up an adverse title in himself; and therefore the principle contended for by the plaintiff does not apply.

The sixth clause of section 2 of the Act on Forcible Entry and Detainer provides that when lands or tenements have been sold under a decree of any court in this state, and after the expiration of the time of redemption any party to such decree "refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto or his agent," the person entitled to possession may recover possession in the manner provided by that act. The action therein provided for is a special statutory proceeding, summary in its nature and in derogation of the common law, and the mode of procedure provided by it must be strictly pursued. (Fitzgerald v. Quinn, 165 Ill. 354, 360.) Such written demand is a condition precedent to plaintiff's right of recovery (Lehman v. Whittington, 8 Ill. App. 374) and such demand must be proved. (Benjamin v. Allison, 201 Ill. App. 34.)

For the error of the court in directing a verdict, and only for that reason, we are constrained to hold that the judgment must be reversed and the cause remanded, and it will be so ordered.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

JOE LABOW, by ISADORE LABOW,
his next friend, et al.,
Appellee,

vs.

ROYAL DRUG CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

238 I.A. 612

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for \$500. There is no appearance on behalf of the plaintiff.

The second amended statement of claim alleges, in substance, that plaintiff, being in defendant's employ, bought of the latter two trucks for \$1850 each; that defendant agreed to take in trade a Ford truck belonging to plaintiff, at an agreed price of \$250, and plaintiff agreed to pay the balance in installments of \$25 a week on each truck, by deducting the same from his salary; that this arrangement continued for twenty-seven weeks, when defendant terminated plaintiff's employment, but refused to repay the amounts which had been so deducted from his salary, aggregating \$1654. The amended affidavit of merits consists of a denial of the alleged contract for the purchase of trucks and of any indebtedness to the plaintiff. The defendant also filed a set-off claiming that while plaintiff was in defendant's employ he collected \$1761.24 belonging to the defendant, which he failed to turn over.

The case was tried before the court without a jury. The only evidence on behalf of the plaintiff was that of the plaintiff himself. His testimony supports his claim. There is in the bill of exceptions what purports to be a transcript of the

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testimony of another witness called by plaintiff, but his evidence seems to have no bearing on any issue in the case. The trial judge certifies that the bill of exceptions contains all the evidence, but that the "reporter had trouble in understanding and getting the testimony" of that witness, and that "from the record," his evidence "seems incomplete;" but the judge does not certify that anything was omitted. Both sides agree that plaintiff was employed at a salary of \$75 a week, that his duty was to deliver defendant's goods and collect the amounts due on goods sent out "C.O.D.," that in making such deliveries, he used two of defendant's trucks, and that \$26 was deducted from his salary each week for each truck. Plaintiff claimed, and defendant's officers denied, that such deductions were to apply on account of the purchase of said trucks, plaintiff insisting that he bought the trucks with that understanding, and defendant claiming that such deductions were made for plaintiff's use of defendant's trucks. Defendant proved by several witnesses that plaintiff had collected moneys for goods sent out C.O.D., that he had failed to turn over all of such collections, and that when his employment ceased, he was "short" more than the amount of the plaintiff's claim. One witness testified that plaintiff admitted such "shortages," but said that there was, nevertheless, due him at least \$300. Plaintiff, in rebuttal, denied that he was ever short or that he ever said he was. At the close of all the evidence, the court said: "I will find for the plaintiff in the sum of \$500."

There is no explanation in the record for this finding. If it be assumed that the court did not believe the defendant's witnesses and did believe the plaintiff, then the finding should have been for \$1654, as claimed by the plaintiff. If it be further assumed that the court believed only part of the plaintiff's story, still, there is nothing in the record upon which a finding of

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\$500 could be based. Defendant contends the finding was a compromise. Whether this be true or not, it is manifestly contrary to the evidence, and for that reason the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

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C. M. HOLMES and
G. C. BERNHIS,
Appellees,

vs.

MYNAN TRAGEN,
Appellant.

4529a
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 612²

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiffs were the lessees in a lease from the defendant of a double store and part of the basement of a building on Broadway, in Chicago. The lease ran for five years beginning April 1, 1923, at a rental of \$150 a month for the first year, \$175 a month for the next two years, and \$200 a month thereafter, and contained a provision stating that lessees have deposited with the lessor \$1200 "as good faith in performing said lease," which is to be applied to the payment of rent for the last six months of the term. Plaintiffs took possession and paid rent until August 30, 1923. On that day they yielded possession of the premises and turned over the keys to defendant. Defendant divided the premises into two stores, rented one, and about December 1, 1923, occupied the other himself. Thereupon plaintiffs brought suit for the remainder of their deposit and recovered a judgment for \$750. Defendant appeals.

The whole controversy turns on the question whether there was a surrender and cancellation of the lease on August 30, 1923, or whether plaintiffs abandoned the premises at that time. This is purely a question of fact. There was evidence on behalf of the plaintiffs tending to prove that defendant accepted plaintiffs' surrender of the premises with the understanding that he should find another tenant or would occupy them himself,

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and that in either case he would return the deposit less the amount of rent lost during the vacancy. On the other hand, there was evidence on behalf of the defendant tending to prove an abandonment of the premises, an unsuccessful attempt by defendant to sublet and a subsequent remodeling of the premises by defendant, who then rented one of the remodeled stores and occupied the other himself. We have examined the evidence in the light of the contentions of appellant's counsel and we are unable to say that the finding of the court is manifestly against the weight of the evidence.

Defendant contends that under the provisions of the lease he was entitled to retain the deposit for the full term of five years, notwithstanding what occurred in 1923, as above stated. We are unable to agree with this contention. If the premises were surrendered to and accepted by the defendant, as we think the court was justified in finding from the evidence, the lease was cancelled, to take effect as soon as the premises were re-rented or occupied by the defendant. After such cancellation became effective, it is obvious that no rent would ever accrue from plaintiffs for the rent of said premises from October 1, 1927, to March 30, 1928, and defendant no longer had any right to retain the deposit made by plaintiffs "as good faith in performing said lease." The remainder of the deposit was therefore recoverable from the defendant as money had and received by him for the use of the plaintiffs.

The judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

238 - 29653

SAM GOLF,
Appellee,

vs.

GEORGE CHIALTAS and
WILLIAM CHIALTAS,
Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

233 I.A. 612³

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

In an action for malicious prosecution, plaintiff recovered a judgment against William Chialtas and George Chialtas for \$150. There is no evidence whatever in the record that would justify a verdict against the latter. While the evidence seems to show that he was a partner of the other defendant and that plaintiff was their clerk, it does not follow merely from the fact of partnership that George was liable for the torts of William. It is too familiar a proposition to require the citation of authorities, that one partner is not liable for the torts of his copartner unless he has in some manner assented thereto or participated therein. There was no proof of such assent or participation.

The rule is also well established that where in an action for tort against two or more the proof fails as to any of the defendants, those against whom there is no evidence are entitled to a verdict. (Jensen v. Varnum, 89 Ill. 100.) A motion was made both at the close of the plaintiff's evidence and at the close of all of the evidence to direct a verdict in favor of the defendants. As to George Chialtas the motion should have been sustained, and it was error to deny it.

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The judgment being a unit as to both defendants, it cannot be reversed as to one and affirmed as to the other, but if erroneous as to one, is erroneous as to all. (East Chicago Street R.R. Co. v. Harrison, 160 Ill. 288.)

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

The following table shows the results of the experiments conducted on the effect of the concentration of the solution on the rate of reaction. The rate of reaction was measured by the volume of gas evolved per unit time. The results are given in the following table:

Concentration of solution (M)	Rate of reaction (ml. gas / min.)
0.1	1.2
0.2	2.4
0.3	3.6
0.4	4.8
0.5	6.0

From the above table it is seen that the rate of reaction increases with the concentration of the solution.

4531 a

SINGER PAPER BOX CO.,
a corporation,
Appellee,

vs.

SIMPLEX CORPORATION,
a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

238 I.A. 612⁴

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for \$134.95 against defendant for the value of work done and materials furnished. Defendant appeals. There is no appearance on behalf of the plaintiff.

Plaintiff is a manufacturer of paper boxes. Defendant deals in automobile accessories. On January 27, 1925, defendant gave to one of plaintiff's salesman a verbal order for 10,000 paper boxes like a sample submitted, "to be delivered at the earliest possible moment," a written confirmation of the order to follow by mail. Plaintiff began work at once. Two days later, defendant mailed a written order to plaintiff to furnish "10,000 boxes printed in two colors as per sample and copy submitted, for Presto Fit Deluxe Mirrors, to be billed at \$5.95 per 0, billing to be made to the Presto Felt Company," and to be delivered to that company at Saukegan. When this letter was received by the plaintiff, the salesman "noticed that the goods were to be billed to the Presto Felt Co.," and "looked up their rating." After doing so, he telephoned to the agent of defendant who had given the verbal order, that plaintiff "would

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have to have some guaranty of payment." Thereupon, defendant's agent dictated a letter guaranteeing the payment of all goods billed to the Haukegan company until further notice. Both the written order and the guaranty were signed in defendant's name, by A. J. Lavery, who testified that he was defendant's advertising and sales manager and had charge of defendant's orders for paper boxes. Plaintiff acknowledged receipt of the guaranty and stated its understanding of the terms of payment. To this letter, defendant replied by mail withdrawing its guaranty. Plaintiff's salesman testified that he then saw Mr. Lavery and that the latter said: "the board cut up and lined would be taken * * * by some other box manufacturer or by the Simplex Corporation." Later, defendant refused to pay anything.

At the time the guaranty was received by plaintiff, it had already "lined the board and cut up 5000 bases, lids and platforms." The evidence shows that the order contemplated a particular kind of board, lined with a special paper, and that all the stock required to make 10,000 boxes of that kind of material had been ordered. The uncontradicted evidence is to the effect that the value of this work and material was \$127.50, which, with \$7.45 for interest thereon, is the amount of the judgment.

The whole argument in the brief of defendant's counsel is based upon the theory that the proof does not show that Lavery had any authority to make such a guaranty as he assumed to make on behalf of defendant. An examination of the record discloses, however, that the suit is not brought upon the guaranty. The statement of claim consists of common law counts for work and labor done and materials furnished, for goods bargained and sold, for goods sold and delivered, and for money due on an account stated. At the opening of the trial, defendant's counsel asked that plaintiff be required to elect upon which of these counts it

intended to rely, and plaintiff's counsel then elected to proceed on the first ^{count} for work, labor and material furnished to defendant, and withdraw all other allegations of the statement of claim. While the evidence shows the guaranty and its withdrawal, the plaintiff claimed nothing upon or by virtue of such guaranty, and, as above stated, the record shows that the amount for which the judgment was entered represents only the value of the work and labor done and materials actually cut up and prepared by plaintiff before the work was stopped by defendant's refusal to guarantee the account if billed and delivered to some one else. As we understand the record, the work was in fact done and the materials prepared under the verbal order. Neither the written order nor the guaranty was ever acted upon, and neither was sued on. Hence, the whole matter of the guaranty cuts no figure in the case, except to show why the original verbal order was never completed.

The judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

371 - 29788

4532

NORTHERN PAPER STOCK COMPANY,
a corporation,

Appellee,

vs.

AMERICAN BOX BOARD COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

233 I.A. 612⁵

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

In a first class action in contract brought to recover payment for eight carloads of paper, defendant's second amended affidavit of merits was stricken on motion of plaintiff; and defendant electing to stand by the same, an order of default was entered against it for want of an affidavit of merits, damages were assessed at the sum of \$2261.25 and judgment was entered for that amount, from which defendant appeals.

Plaintiff's amended statement of claim, after stating generally that its claim is for the amount due for goods, wares and merchandise sold and delivered by plaintiff to defendant in November and December, 1922, alleges that in September, 1922, the parties entered into a verbal contract for the sale and delivery by the plaintiff to the defendant of various kinds of paper, at such times and in such amounts and at such prices as the parties would thereafter from time to time agree upon; that "when purchases were made the purchasers would load into railroad cars and consign the paper to defendant at Grand Rapids, Michigan," and that the prices to be paid would be f.o.b. cars at Chicago, cash to be paid for within thirty days after the same was loaded at Chicago. This allegation is denied by

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the second amended affidavit of merits.

The statement of claim then alleges that "pursuant to and in accordance with such understanding of September, 1922," two written orders, which are set out in Exhibits, were given to the plaintiff. The first was dated October 31, 1922, and called for 300 tons of #1 Mixed Paper at \$27 a ton, and 200 tons of #1 Newspaper at \$23 a ton, to be packed in machine-compressed bales, clean, dry and free from strings, dirt and foreign material, and delivered "during November without bunching," upon the terms "Net 30 days f.o.b. Chicago." It is alleged that this order was afterwards, by mutual agreement, amended so that the quantity of #1 mixed paper to be delivered on that order was 250 tons instead of 300 tons. The second order was dated December 1, 1922, and called for 250 tons of #1 Mixed Paper at \$20 a ton, to be delivered "during December without bunching," and contained the same statements as to packing, grade, and terms of payment as the first order. The giving of these orders is admitted by the amended affidavit of merits, but the statement that such orders were given pursuant to a verbal contract made in September, 1922, is specifically denied.

The statement of claim then alleges that during the month of November, 1922, plaintiff shipped to defendant fourteen cars of paper, which were accepted by the defendant; that the last car so shipped was not paid for and its value was \$333.64. This allegation is admitted by the amended affidavit of merits, which states that the sum mentioned was tendered to plaintiff in open court and the tender was refused, whereupon defendant paid that amount of money to the clerk of the court for the use of the plaintiff.

The statement of claim next alleges that under the second order, plaintiff shipped to defendant, between December 4, 1922, and December 26, 1922, seven cars loaded at Chicago

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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with paper of the character mentioned in that order, and the details of these shipments are set forth in seven separate paragraphs; that said seven cars were accepted by defendant but were not paid for; and that the value of the eight cars received and accepted by defendant, but not paid for, is \$2123.05. The amended affidavit of merits does not deny any of these shipments nor the alleged value of the same, nor that they were not paid for. As to such eight cars, the affidavit of merits admits that defendant owes for the car shipped in November but claims that plaintiff did not perform the second contract and as against plaintiff's claim for the value of seven cars actually delivered under that contract, claims the right to recoup damages for such non-performance, as hereinafter stated.

The statement of claim then alleges that on December 21, 1922, plaintiff was informed by defendant "that defendant could not take in any more paper, that the plant of defendant was down and that defendant could not make payment for the cars shipped in November, 1922." This allegation is flatly denied in the amended affidavit of merits.

The statement of claim also sets forth, in hæc verba, certain letters of the defendant, purporting to show that after December 21, 1922, defendant complained that plaintiff was behind in its shipments under the second order and demanding "immediate shipment of all tonnage so that the order may be completed within the period," and that later, defendant admitted it was behind in its payments on plaintiff's "invoices prior to December 1st," but had mailed a check for the sum in January, 1923. The statement of claim then alleges that because such payment was not made within thirty days after the cars were loaded at Chicago, defendant had "breached its contract and was in default" when such letters were written.

The statement of claim concludes by alleging that

The first of the two main branches of the
theory of the mind is the theory of the
senses. The second is the theory of the
intellect. The third is the theory of the
moral faculties.

The theory of the senses is the theory of the
perception of the external world. It is the
theory of the way in which the mind
receives information from the outside world.
The theory of the intellect is the theory of
the way in which the mind processes the
information it receives. It is the theory of
the way in which the mind forms concepts
and judgments. The theory of the moral
faculties is the theory of the way in which
the mind determines what is right and
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wrong. It is the theory of the way in which
the mind forms moral principles and
decides what to do.

the sum of \$139.50 is also due for interest on the value of the eight cars unpaid for.

In the amended affidavit of merits, aside from the tender of the amount due upon the car shipped in November, 1922, it is alleged that the paper that was shipped during November, 1922, was not up to grade and contained dirt and other foreign matter, on which account defendant claimed the right to make certain deductions from the contract price and offered to pay the remainder; that plaintiff refused the offer, whereupon defendant paid the amount it admitted was due under the first contract and plaintiff brought suit for the difference, which was originally a part of plaintiff's statement of claim in this suit, but was afterwards waived by the plaintiff and omitted from the amended statement of claim; that plaintiff failed to comply with either of said contracts with respect to the quantity of paper shipped by it; that because of plaintiff's failure to ship the quantities ordered, defendant went into the open market, after notifying plaintiff it would do so, and bought 150 tons of No. 1 mixed paper of the kind and grade specified in the contracts, at the then prevailing fair market price of \$32 a ton, or \$1800 in excess of the contract price which defendant seeks to recoup as against the demand of the plaintiff.

From the foregoing, it will appear that several of the material allegations of fact upon which the alleged right of action of the plaintiff depends are specifically denied by the amended affidavit of merits, and that an apparently valid claim of recoupment is interposed. The gist of the plaintiff's claim is that by reason of defendant's failure to pay, according to the terms of the contracts, for the paper it received, plaintiff had the right to and did abandon the special contracts and sue for the value of the goods actually delivered. The right to maintain such an action was affirmed in Hess Co. v. Denson, 149 Ill. 138.

The first of these is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the Alaska Railroad.

The second is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the Alaska Railroad.

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The fifteenth is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the Alaska Railroad.

To this claim of the plaintiff, defendant's reply, in substance, is that the November contract was completed and all paid for except the price of one car, which it admitted and tendered; that as to the December contract, plaintiff was itself in default at the time the suit was brought, by reason of its failure and refusal to complete the performance of its contract, and defendant is entitled to recoup its damages occasioned thereby. If the essential facts stated in the amended affidavit of merits are true, defendant has a good defense to at least a part of the plaintiff's claim. The affidavit is unnecessarily long and involved. Page after page of its averments consist of conclusions and arguments and the recital of evidence, none of which has any proper place in such an affidavit. Nevertheless the affidavit does join issue with the plaintiff upon some of the facts alleged by the plaintiff which are essential to its right to recover, and upon such issue defendant was entitled to a trial.

As the suit is not brought upon the contracts but is brought upon the theory that the contracts were cancelled, interest is only allowable if unreasonable and vexatious delay in payment is shown. We may also add that we think that the point made by defendant's counsel that the contracts were separate and that a default in one would be no valid ground for cancelling the other, is well taken.

Plaintiff's counsel have caused to be inserted in the record the rules of the Municipal court, which require that an affidavit of merits shall state that the affiant "has knowledge of the facts." It is claimed that defendant's affidavit of merits does not so state. It is made and signed by a man who says he is the general manager of the defendant. After stating the facts we have enumerated, he signs it and his affidavit is appended stating that he "has read the above and foregoing amended affidavit of merits by him subscribed, and knows the contents

thereof and that the matters and things therein set forth are true." Defendant's counsel say that this point was not made in the trial court. There is nothing in the record to show whether it was or not. However, we think the statement quoted that the "affiant knows the contents" of the affidavit "and that the matters therein set forth are true," amounts, in effect, to a statement that he "knows" the facts so stated. It seems improbable that any lawyer would permit a judgment to be entered against his client because of such an alleged defect, when all question about it could be so easily removed by amendment, if the objection was in fact made in the trial court.

For the reasons stated, the judgment is reversed and the cause remanded for a trial upon the issues presented by the amended statement of claim and the second amended affidavit of merits.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

384 - 29801

M. M. OLSON,
Appellee.

vs.

CHRIS G. LEVENTIS,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

238 I.A. 613

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

By this appeal, appellant, Chris G. Leventis, seeks to reverse a judgment against him for \$267.58, recovered in an action in contract brought against him and Rusetos & Co., a corporation. He contends that the only issue presented by the pleadings was that of joint liability, that the evidence fails to show any liability, joint or several, and that the court erred in dismissing Rusetos & Co. and entering judgment against him alone.

The statement of claim alleges a promise by both defendants to pay for work done and materials furnished by plaintiff at their request. Leventis, in his affidavit of merits, denies that both defendants, or he alone, ordered the work mentioned in the statement of claim. Rusetos & Co., in its affidavit of merits, alleged that both defendants ordered the work done, and that it was agreed that it should pay \$150 of the cost of the same and Leventis should pay the remainder.

Plaintiff is a sign painter. Rusetos & Co. deal in ice cream, and Leventis operated a lunchroom and bought his ice cream from that company. It appears that plaintiff furnished Leventis with an electric sign at an agreed price

of \$250, and that he afterwards painted a number of signs which were installed in Leventis' place of business. Most or all of these signs contained an advertisement of Russeton & Co.'s ice cream, and Leventis testified that he understood that Russeton & Co. were making him a present of the signs, as advertisements. Plaintiff testified, however, that when the electric sign was ordered, the agent for Russeton & Co. agreed to pay \$150 towards the cost of it and said, in the hearing of Leventis, that Leventis would pay the balance, to which Leventis said nothing, but accepted the sign. Plaintiff also testified that all of the other work and materials included in the plaintiff's claim were ordered by Leventis. The evidence shows that Russeton & Co. paid plaintiff \$150, which it contended, was all it agreed to pay. Evidently, the trial court concluded from the evidence that such was the agreement of the parties; for at the close of all the evidence, the court entered a finding in favor of Russeton & Co. and dismissed the suit as to it, and then entered a finding and judgment against Leventis for the balance of the plaintiff's claim. After a careful review of the evidence contained in the record, we think the finding and judgment of the court is fully supported by the evidence and that there was no error in dismissing the case as to Russeton & Co. and entering judgment against Leventis alone.

The judgment is affirmed.

AFFIRMED.

Gridley, J., concurs.

30024

CHARLES J. TRESHER,
Appellee,
vs.

UNION FUEL COMPANY et al.

On Appeal of ANDREW STEVENSON.
Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

233 I.A. 613 ⁸²

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver for the Union Fuel company, a corporation.

This bill is filed by a stockholder and alleges that the corporation has a capital stock of \$1,500,000, half preferred and half common, and owns six coal mines in Illinois, upon which there are encumbrances in the form of first, second and third mortgage bonds aggregating \$1,225,000; that in September, 1923, the corporation "became and was financially involved and unable to procure funds with which to operate its coal mines and coal properties," whereupon, by authority of the board of directors, the officers of the corporation executed a lease of all its properties for a term of sixteen years, with a provision that the lease might be terminated at the end of any calendar year by either party upon three months' written notice and payment of \$10,000; that by the terms of the lease, the lessee agreed at "its" own cost and expense to keep and maintain the lessor's property in good condition and repair and pay all taxes thereon, and to pay a royalty of seven and one-half cents per ton of coal extracted from the mines, and also agreed to advance from time to time to the lessor such sums of money as would be sufficient to pay any installment of principal or interest due upon its mortgages or other encumbrances; that the lessee had made such ad-

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vances until the lessor owed the lessee \$35,000; that in April, 1924, the lessee ceased to operate the mines and on September 24, 1924, notified the lessor of its intention to terminate the lease at the end of the calendar year 1924; that the officers and directors of the corporation "have advised your orator that they have no funds or securities from which funds can be realized with which to operate or to maintain" its coal mines and intend to cease operating the same and to cease doing business as soon as the mines shall be surrendered by the lessee at the end of the calendar year 1924; that "by reason thereof the said coal mines and coal properties will rapidly deteriorate and be wasted, water will accumulate therein and the value of all of said properties will rapidly decline;" that complainant is informed and believes that the value of all the assets of the corporation is not sufficient to pay its bonded indebtedness and the par value of its preferred and common stock; that the semi-annual interest on \$810,500 of the bonds will be due on January 1, 1925, and that complainant is informed and believes that there are no funds available for the payment thereof, "nor are there any funds available for the services of watchmen or employees to protect the said coal mines, properties and rights from loss, deterioration, waste and depreciation."

As originally filed, the only defendants named in the bill were the corporation and the trustee in the trust deeds securing its mortgage bonds. The prayer of the bill is that the corporation be dissolved, its assets sold and the proceeds distributed among the persons entitled thereto, that a receiver be appointed with power to manage and control the property pendente lite, with the usual powers of receivers in chancery, and such other and further relief as equity may require. The names of the officers and directors are not given, and they are not made parties

as such. The bill was duly verified. Upon notice to the defendants and to "Leland Coal Company" (which is not named as a defendant), a receiver was appointed in accordance with the prayer of the bill.

Seventeen days later, appellant, another stockholder, was given leave to file an intervening petition and he made a party defendant. His petition, briefly stated, sets forth a series of transactions between certain stockholders and directors of the Union Fuel Company, and a corporation called Garard & Company, engaged in the "investment securities business," whereby the latter acquired a controlling interest in the Union Fuel company, and then incorporated the Leland Coal Company, and caused the former to execute to the latter the lease mentioned in the bill, which, it is alleged, was a fraud upon the Fuel company and the intervening petitioner; that W. H. Leland, who had been president and general manager of the Fuel company, resigned to become president and director of the lessee company; that seven months later, as part of the "conspiracy to wreck the Fuel company and to dissipate its assets to the benefit and gain of Garard & Company," the lessee suddenly ceased the operation of the mines and has failed to operate the same since that time, as a result of which the surplus and undivided profits of the Fuel company, amounting to approximately \$154,000 when the lease was made, have been wiped out and there exists a deficit of approximately \$90,000; that this loss, it is charged, "was the result of the grossly negligent mismanagement of the affairs of the Fuel company under the direction of Garard & Company and its officers and agents who were directors of the Fuel company;" and that the president of the Fuel company (who is a director and one of the largest stockholders of Garard & Company) has stated that he would permit the Fuel company to be

thrown into the hands of a receiver. Soon after this intervening petition was filed the bill was amended by adding as parties defendant all the stockholders of the Fuel company.

Appellant's counsel contend that the order appointing the receiver is absolutely void. Starting with the premise that, except as prescribed by statute, a court of equity has no power to dissolve a corporation, they claim that the only statute of this State purporting to give such jurisdiction is the Corporation Act, and that such act confers such jurisdiction only when a suit in equity is brought by a creditor, for one of the causes mentioned in section 53 thereof. Appellee's counsel replies by pointing out the fact that the bill prays not only for the dissolution of the corporation, but also for such other and further relief as equity may require; and contends that under this prayer, a court of equity has jurisdiction to appoint a receiver to take charge of the property and affairs of a corporation in cases of fraudulent mismanagement by the officers and directors thereof, and asserts that it appears that the affairs of the Union Fuel company "are being woefully mismanaged."

Counsel on both sides rely to a large extent upon the same case, viz: Blanchard Bro. & Lane v. Gay Co., 289 Ill. 413. In that case a creditors' bill was filed under what was then section 25 of the Corporation Act, praying for the dissolution of the S. G. Gay Company and the appointment of a receiver. The bill alleged that nearly three years before it was filed, one of the stockholders of that company had filed a bill alleging that the company had assets worth about twice the amount of its indebtedness, but had reached a point where it was impossible to borrow money or obtain any further funds for the continuance of its business, whereupon a receiver had been appointed, who took possession of the assets of the company and sold the same to

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certain banks. It was alleged in the creditors' bill that the acts of the receiver appointed in the prior stockholders' suit were void. The lower court sustained a demurrer to the creditors' bill and dismissed it for want of equity. The Supreme court reversed this ruling, holding that the creditors' bill stated a good cause of action under section 25 of the Corporation Act and that the appointment of a receiver under the prior stockholder's bill was void for want of jurisdiction. In the course of its opinion, the court said:

"Courts of chancery have no general power to appoint receivers of corporations, and the general rule is that they can only appoint receivers where expressly authorized by the statute. (Casquard v. National Linseed Oil Co., 171 Ill. 480.) Courts are particularly disinclined to appoint a receiver for misconduct or mismanagement of a corporation or for the purpose of merely preserving its assets where the application is made by stockholders, for the reason that the sovereign does not furnish public agencies for the carrying on of private enterprises. (5 Thompson on Corporations, sec. 6347; 34 Cyc. 84, par. c.) There are exceptions to this general rule. A stockholder may invoke and set in motion the powers of a court of equity to appoint a receiver where the corporation is fraudulently mismanaged by the officers, whereby it is in imminent danger of insolvency or has been rendered insolvent by reason of such mismanagement. (34 Cyc. 86.) It has been expressly held by this court in People v. Waisley, 153 Ill. 491, that a stockholder may not invoke the jurisdiction of a court of equity to take charge of all the company assets by a receiver, and thus defeat the action of the creditors, under said section 25. Appointing a receiver to take possession of the assets of a corporation and to distribute them is tantamount to dissolving the corporation by decree in equity."

Applying the principles thus stated to the facts of this case, it seems clear that in so far as the bill in this case prays for the dissolution of the corporation and the appointment of a receiver as an incident thereof, it cannot be maintained, because the complainant alleges that he is a stockholder and does not allege that he is a creditor of the defendant corporation. By the express terms of section 53 of the present Corporation Act the remedy therein prescribed is given to creditors only. Section 54 of the present act is a re-enactment almost verbatim of the last three sentences of

section 25 of the act in force prior to July 1, 1919, under which it was held that the "good cause shown," therein mentioned, referred to the causes enumerated in the first part of that section, which are now given in section 53 of the present act. (Whasler v. Fullman Iron & Steel Co., 143 Ill., 197; Abbott v. Laving, 308 Ill. 154, 167, 168.)

It follows that the order appointing the receiver was void, unless such appointment can be justified upon the theory advanced by appellee, viz: that the bill appeals to the general equity powers of the court for relief against "the fraudulent mismanagement" of the officers and directors of the corporation. Among the allegations of the bill, we find no allegation of any such fraudulent mismanagement, and no facts from which such fraudulent mismanagement can be reasonably inferred. If we were permitted to read into the bill some or all of the allegations of the intervening petition, a case of that character might perhaps be made out. But the intervening petition was filed some time after the order appointing the receiver was entered and the complainant did not even then adopt such allegations as his own or ask to have them made a part of his bill. On the contrary, in his sworn answer to the intervening petition, he disclaimed any knowledge of the facts stated in the intervening petition and asked that the intervening petitioner be required to prove the same. According to the allegations of the bill, the Union Fuel company had not been adjudged bankrupt, nor had any execution against it been returned unsatisfied, nor had the corporation ceased doing business "leaving debts unpaid." While the bill alleges, on information and belief, that it was the intention of the officers and directors to cease doing business as soon as the lease expired, that time had not arrived and no presumption of fraudulent mismanagement

arises merely from the expression of such intention by the officers and directors. For aught that appears on the face of the bill, such intention may have been prompted by the dictates of common honesty, or a desire to permit the creditors to take such action as they might think best under all the circumstances. No other ground of equitable jurisdiction is suggested by counsel.

For the reasons stated, the order appointing a receiver is reversed.

REVERSED.

Barnes and Gridley, JJ., concur.

4535a

WALTER J. FLENS,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

vs.

WILLIAM T. DICKERMAN,
Appellant.

238 I.A. 613 1/2 3

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1000 rendered after verdict against defendant by the Municipal Court of Chicago on April 10, 1924, in an action for slander.

Plaintiff's statement of claim alleges in substance that in November, 1919, he (Flens) was the attorney of record for a plaintiff in a certain suit, then pending in said Municipal Court for the second district, entitled Bakuskyas v. St. Izidors Lithuanian Society, and the present defendant, Dickerman, was the attorney representing the society; that in the suit Dickerman had filed a petition on behalf of the society to set aside the judgment previously rendered against it; that on November 24, 1919, at the conclusion of the hearing of the petition, Dickerman, in the hearing of the judge and various other persons, maliciously made certain slanderous and defamatory statements of and concerning Flens, charging him in effect with the stealing or conversion of \$9, and with having committed perjury at the time of the trial of the suit which resulted in the entry of said judgment against the society; and that as a result Flens has been injured in his good name, credit and reputation in the community and has been damaged to the extent of \$1000. Dickerman's affidavit of merits amounts to a plea of the general issue with the further plea that Flens had not been damaged and that such statements as were made at the time were privileged.

THE ALBES

On the trial of the present action six witnesses testified for plaintiff and five for defendant and much testimony was heard. But, inasmuch as we have reached the conclusion that the judgment should be reversed and a new trial had, because of certain procedural errors of the trial court, we refrain from a discussion of the evidence.

Among the several points urged and argued by defendant (pp. 32) as grounds for a reversal of the judgment are: (1) Prejudicial remarks of the court in the hearing of the jury wherein was indicated the court's opinion as to certain facts in controversy. (2) Undue limitation by the court of the time that defendant might consume in his argument to the jury at the close of all the evidence. We are of the opinion that both of these points are well taken. For a trial judge to intimate or give an opinion upon a question of fact in controversy invades the province of the jury and is prejudicial error, as are also expressions by him during the trial tending to show a bias for or prejudice against either party. (Andrew v. Ketchum, 77 Ill. 377, 379; Marzen v. People, 173 Ill. 43, 57; People v. Lurie, 276 Ill. 639, 640.) A careful examination of the proceedings on the trial discloses that some of the court's remarks violated these rules and also tended to belittle and prejudice defendant's defense in the minds of the jury. And we think, in view of the issues and the mass of testimony presented, that the court did not allow defendant sufficient time to argue his case before the jury. The court limited the arguments to 10 minutes on a side, to which ruling defendant objected, stating that he needed more time to present to the jury a proper analysis of the evidence. After defendant had addressed the jury for 14 minutes the court stopped him (notwithstanding his objection and statement that he had important matters yet to argue) and adjourned court to the

following morning (when the jury were orally instructed) stating to the jury: "You will have to come back anyhow. I don't assume it is going to take any great time to deliberate." In White v. People, 90 Ill. 117, it was held to be error for the trial court to limit the argument to five minutes on a side. The Court, after stating that a trial court had a discretionary power to limit arguments of counsel within reasonable bounds, said (p. 120): "But the restriction must always be a reasonable restriction, and what is reasonable must be determined from the character and circumstances of the case on trial." (See, also, Switnash v. Levy, 57 Ill. App. 106; Marcell-Black Foundry Co. v. Clark, 214 Ill. 599, 415.) We think that the limitations as to the time to be consumed by counsel in arguments in the present case were unreasonable under the circumstances, and that the trial court abused its discretion.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, F. J., and Barnes, J., concur.

1536a

FIRST NATIONAL BANK OF
OAK PARK, ILLINOIS,
Plaintiff and Appellant.

vs.

W. H. WILLIAMS, W. J. WILLIAMS
and MARY A. WILLIAMS,
Defendants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

233 I.A. 613

MARY A. WILLIAMS,
Appellant.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 18, 1922, plaintiff caused to be entered in the Municipal Court of Chicago a judgment by confession for \$7,945.04 against the defendants on three judgment notes signed by them, payable to plaintiff's order, dated respectively on January 17th, 18th and 31st, 1921, and bearing interest at the rate of 7% per annum after maturity. The first note was for \$1500, due in 90 days after date, on which there was an endorsement that \$300 had been paid on the principal; the second for \$2500, due in 90 days; and the third for \$3000, due in sixty days. The amount of the judgment entered was for principal, \$6700, accrued interest, and \$750 attorney's fees. When the judgment was confessed the due dates of the notes had long since passed.

At the time the notes were given W. H. Williams and W. J. Williams, his son, were engaged in business as contractors under the firm name of W. H. Williams & Son, which firm had succeeded W. H. Williams in said business, and he and, after him, the firm had had frequent business dealings with the plaintiff bank, borrowing from it from time to time large sums of money upon their individual notes, which sometimes were signed

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and its associated personnel have, until now, been able to maintain

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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also as surety by Mary A. Williams, the second wife of W. H. Williams and step-mother of W. J. Williams. She was not interested in their business as a partner or otherwise.

After the judgment was confessed further proceedings against W. H. and W. J. Williams were ordered stayed because it appeared that they had filed a voluntary petition in bankruptcy in the U. S. District Court, had scheduled the indebtedness as evidenced by said notes, and on December 5, 1921, had been discharged in bankruptcy from all their provable debts, which order of discharge remained in full force.

On July 17, 1922, on motion of Mary A. Williams, the court ordered the judgment, as confessed, opened and gave her leave to plead, the judgment to stand in the meantime as security. In her affidavit of merits, subsequently filed, she set up among others the following defenses in substance: (1) That the judgment notes in question were given to evidence a then existing indebtedness to the plaintiff bank of the firm of W. H. Williams & Son, that she had signed them solely as an accommodation maker or surety for the members of said firm, which fact was known to the bank at the time, and that on April 25, 1921, for a valuable consideration, the bank accepted new notes signed only by the members of said firm, and extended the period of payment of said indebtedness without her knowledge or consent; and (2) that on said day the plaintiff bank accepted said new notes of the members of said firm in payment and discharge of the judgment notes used upon. In support of her second defense she alleged that after W. H. and W. J. Williams had filed their petition in bankruptcy the plaintiff bank filed their claim in the bankruptcy court, basing their claim on said new notes, and afterwards accepted dividends from the bankruptcy court aggregating 88% of its claim on said new notes.

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There was a former trial of the case before a jury resulting in a verdict, by the court's direction, finding the issues against the plaintiff bank, but a new trial was granted. On the last trial considerable evidence, both oral and documentary, was presented by the parties solely on the issues as raised in Mrs. Williams' affidavit of merits, and the jury returned a verdict finding those issues in her favor, and the judgment appealed from, setting aside said judgment by confession, as against her, was entered on June 24, 1924. On the last trial Henry Pillinger, president of the plaintiff bank, testified on direct examination that when she signed the judgment notes sued upon he did not know that she was acting merely as surety for the members of the firm of W. H. Williams & Son, but it was brought out on cross examination that on the former trial he had testified to the contrary, saying that at that time he "took it for granted" that she signed said notes "as guarantee for her husband and son." It further appeared that when said new notes, signed only by W. H. and W. J. Williams, were taken by the bank, it received from them the amount of the interest thereon from April 25, 1921, the date of the notes, to their respective maturities.

We deem it unnecessary to set forth in detail the evidence presented as to said two main issues, and as to which most of the evidence was directed. Suffice it to say that in our opinion, after a review of the evidence, we think it clearly appears that said notes, upon which the judgment was confessed, were signed merely as surety by Mrs. Williams for an indebtedness of W. H. and W. J. Williams to the bank, and that at their maturity the bank with knowledge extended the time of the payment of said indebtedness, without the expressed or implied consent of Mrs. Williams, and accepted new notes from said W. H. and

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The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, for the term of four years, to-wit:

W. J. Williams in payment of said indebtedness as evidenced by the old notes, upon which the judgment in question was confessed. In Yates v. Valentini, 71 Ill. 643, 644, it is said: "When a subsequent promissory note is given for the same consideration as a former one, it is a question of fact for the determination of the jury, whether the former note is thereby satisfied. If the subsequent note was executed and accepted by the respective parties for that purpose, the satisfaction is complete." In Halleysville Savings Bank v. Bernman, 124 Ill. 200, 207, it is said: "The intention with which the new note is accepted will control as to whether the original note or draft is paid and discharged by the acceptance of another in renewal of it, or not, and that this may be shown by proof of an express agreement of the parties as to the effect of the renewal upon the indebtedness evidenced by the former note or bill, or by proof of the attendant circumstances, from which the intention of the parties can be inferred." (See, also, Wheelock v. Berkley, 138 Ill. 153, 156; English v. London, 181 Ill. 614, 619; Highland Park State Bank v. Sheehan, 149 Ill. App. 325, 329.) We think that the verdict and judgment were fully warranted by the evidence, and that the judgment should be affirmed. It is so ordered.

AFFIRMED.

Fitch, F. J., and Barnes, J., concur.

It is difficult to imagine the extent of the damage done to the old building, which was destroyed by fire in 1871. The only part of the building which remained standing was the tower, which was used as a storehouse for the books of the library. The rest of the building was completely destroyed, and the books were scattered all over the place. The only part of the building which remained standing was the tower, which was used as a storehouse for the books of the library. The rest of the building was completely destroyed, and the books were scattered all over the place. The only part of the building which remained standing was the tower, which was used as a storehouse for the books of the library. The rest of the building was completely destroyed, and the books were scattered all over the place.

THE END OF THE WORLD

223 - 29640

CHICAGO OPERA ASSOCIATION,
a corporation,

Appellant.

vs.

CHICAGO RAILWAYS COMPANY,
a corporation, and CHICAGO
CITY RAILWAY COMPANY, a
corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

238 I.A. 614

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of trespass on the case the jury found the defendants not guilty, upon which verdict the court entered judgment in their favor and plaintiff appealed.

Plaintiff's declaration consisted of two counts, but the second count was withdrawn before the case was submitted. It is alleged in the first in substance that on March 13, 1922, plaintiff was the owner and possessed of certain stage furniture, settings and properties of the value of \$5,000, which were being hauled and transported upon a certain motor truck and trailer across Wabash avenue, Chicago, near No. 1701 South Wabash avenue, and plaintiff, its agents and employees, were in the exercise of due care and caution for the safety of the furniture, etc.; that defendants by their agents were operating a certain street car in a northerly direction along Wabash avenue; and that, in violation of their duty to exercise ordinary care in the operation of the street car, they so carelessly and negligently operated it that it with great force and violence ran into and collided with said truck and trailer, whereby parts of the furniture, etc., were destroyed or damaged. Defendants filed a plea of the general issue.

89814-614

UNITED STATES
DEPARTMENT OF
THE ARMY

RECEIVED
OFFICE OF THE
ADJUTANT GENERAL

UNITED STATES
DEPARTMENT OF
THE ARMY

TO THE ADJUTANT GENERAL
FROM THE ADJUTANT GENERAL
SUBJECT: [Illegible]
[The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a memorandum or report detailing military operations or administrative matters.]

Wabash avenue is a north and south street, and on its east side at the number mentioned plaintiff had a warehouse, facing west, where its stage furniture and properties were stored when not in use. Defendants operated a double track street railway on Wabash avenue. Northbound cars moved on the east track and southbound cars on the west track. 18th street intersects Wabash avenue at right angles and cars turned at the intersection. Those travelling west on 18th street, after making the turn, continued north past plaintiff's warehouse, the doorway of which, according to the somewhat uncertain evidence, was about 230 feet north of 18th street. The main floor of the warehouse was five feet above the level of the sidewalk, and there was an incline of about five feet in fifteen coming out of the building to the sidewalk, and a further incline to the street where the curbing was cut away. The distance from the east curb to the east rail of the east track was from 15 to 20 feet.

On the morning of March 13, 1932, the motor truck was standing inside of the warehouse and being loaded with a lot of stage furniture, etc., to be conveyed to a railroad depot, in the presence of one Holmes, who is described by different witnesses as plaintiff's "foreman," "scenic transportation man" or "transportation agent." The truck was owned by the Central Transfer Co., and certain of its employees as well as certain of plaintiff's employees assisted in its loading. It was a six-wheel truck of two sections - the front section having four wheels, and the rear section being a "trailer," about 16 feet long. After the loading was completed the driver of the truck, Patterson, an agent of the Transfer Co., took his usual position in the cab in the front part of the front section. Holmes was seated alongside of him. The truck was driven out of the warehouse and was proceeding across Wabash avenue in a westerly direction when the

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trailer was struck by one of defendants' northbound cars, and it was pushed to one side and turned over and parts of the furniture, etc., were thrown upon the street and broken or damaged.

Plaintiff's theory, supported mainly by the testimony of the driver of the truck, was in substance that the truck and attached trailer moved out of the warehouse, down the incline, and proceeded across the street at a slow speed; that the driver stopped, just as the cab was beyond the building line, looked to the south but saw no car or vehicle approaching; that he proceeded on and when the front end of the truck was about on the northbound track he saw a street car just turning the corner at 18th street; that he proceeded farther and looked again to the south and saw the car about 18 feet away, moving at an excessive rate of speed, and immediately thereafter the car struck the trailer. Defendant's theory, supported by the testimony of the motorman of the street car and other testimony, was in substance that, after the street car had turned the corner at 18th street and was proceeding northward in Wabash avenue at not an excessive rate of speed, suddenly and without warning the truck came swiftly out of the warehouse and proceeded westward in front of the oncoming car; that the motorman, although he immediately shut off the power and applied the brakes, was unable to avoid the collision, which was so severe that the front of the car was damaged and the motorman slightly injured; that plaintiff's foreman, Holmes, sitting in the front part of the truck alongside the driver either saw or could have seen the oncoming street car in time to have warned said driver and thereby have avoided the collision, yet he gave no warning of any kind to the driver; and that his want of diligence under the circumstances proximately contributed to the collision and plaintiff's resulting damages. Holmes was not produced as a

witness on the trial.

On the questions of the negligence of the motorman of the street car and of the contributory negligence of plaintiff's foreman, Holmes, we are unable to say, after reviewing the transcript, that the verdict is manifestly against the weight of the evidence. We think that the jury was justified in finding that the apparent negligence of the driver of the truck was the proximate cause of the accident (Union Traction Co. v. Leach, 215 Ill. 184, 186.) And while his negligence may not be imputable to plaintiff, still plaintiff is responsible for the negligence of its agent, Holmes, who was seated on the truck alongside the driver, and if Holmes' negligence contributed to the accident plaintiff cannot recover, (Flynn v. Chicago City Ry. Co., 250 Ill. 460, 464.) Holmes either saw or should have seen the approaching street car in time to have warned the driver against moving the truck in the path of the oncoming car, yet, having the opportunity to learn of the impending danger and to avoid it by giving a warning, he did not comply with his duty and give the warning. (Picenta v. Chicago City Ry. Co., 284 Ill. 248, 259; See v. Fryer, 294 Ill. 538, 547.)

And we do not think that the court committed reversible error in refusing to allow the witness, Tobin, called by plaintiff in rebuttal, to give his opinion as to the number of feet in which a moving street car can be stopped under certain named conditions. The proposed testimony was not proper rebuttal, and furthermore, its admission or rejection was a matter within the discretion of the trial judge. In Munderlich v. Burger, 287 Ill. 440, 444, it is said: "Where evidence properly admissible in evidence in the first instance is offered in rebuttal, it is within the sound discretion of the court whether it shall be received, and the exercise of such discretion will not be reviewed.

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It will not be held that there has been an abuse of such discretionary power unless some injury has been occasioned." We fail to see wherein any injury was occasioned to plaintiff by the ruling.

Complaint is made that the court erred in refusing to give two instructions offered by plaintiff and in giving instructions, Nos. 9 and 13, offered by defendants. The jury were fully and fairly instructed. Twenty seven instructions were given in all, nine being offered by plaintiff and eighteen by defendants. And, when the given instructions are considered, it is our opinion that the court did not commit reversible error in refusing to give either of the two instructions mentioned. We think that the first is involved and uncertain and, had it been given, would have tended to mislead the jury, and that the second is not sufficiently applicable to the issues as presented, and, had it been given, would also have tended to mislead the jury. And we fail to see wherein the court committed error in giving the two instructions mentioned. They were applicable to the issue of contributory negligence and state the law, as we understand it, with substantial accuracy.

Finding no reversible error in the record the judgment of the Superior Court is affirmed.

AFFIRMED.

Witch, F. J., and Barnes, J., concur.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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29782
GEORGE ELIAS and
JAMES STAYNOPOULAS,
late partners doing
business as Victoria Lunch
Company.

Plaintiffs and Appellees,

vs.

RELIABLE STORE FIXTURE COMPANY,
a corporation, and SOL SPITZER,
Defendants.

On appeal of SOL SPITZER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 614²

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On February 17, 1921, plaintiffs commenced a tort action against the Reliable Store Fixture Company, a corporation, for damages for the alleged conversion to its own use of certain store fixtures and chattels. Subsequently Sol Spitzer, president of said corporation, was made an additional party defendant, and in September, 1922, plaintiffs filed an amended declaration charging both defendants with said conversion, to which declaration they filed a plea of the general issue. A trial was had in February, 1924, resulting in the jury returning two verdicts, which are inconsistent as to the defendant, Spitzer, as follows: "We the jury find the defendants guilty and assess the plaintiffs' damages at the sum of one dollar," and "we the jury find the defendant, S. Spitzer, guilty and assess the plaintiffs' damages at the sum of \$500." On February 23, 1924, the court, after overruling Spitzer's motions for a new trial and in arrest of judgment, entered separate judgments on the two verdicts, - one against the Reliable Store Fixture Company for one dollar and costs and the other against Spitzer for \$500 and costs. Spitzer appealed.

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We are of the opinion that neither one of the judgments can stand. In 33 Corpus Juris, p. 1124, sec. 73, it is said: "At common law, only one final judgment may be entered in an action. If the action is on contract, the judgment, with certain limited exceptions, must be for or against all defendants jointly; separate judgments for the same or different amounts against defendants severally cannot regularly be rendered, * * . likewise in actions at common law for tort, while judgment may be entered against certain defendants, and in favor of others, there can be but one judgment record which must include both the judgment in favor of plaintiff against defendants found liable and that in favor of defendants found not liable, and the judgment must be a joint judgment for one single amount against all found liable." (See, also, Illinois Central R. Co. v. Foulke, 92 Ill. App. 391, 398; Fields v. Williams, 91 Ala. 502, 505; Centahia v. Flavin, 221 Mass. 259, 261; Rundhausen v. Bond, 36 Wis. 26, 41.) We have not been referred to any statute in this state which changes such common law rule, where the procedure was as disclosed in the present record.

Both of the judgments are reversed and the cause is remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

MARY J. HAMILTON, sole residuary
legatee under the last will and
testament of David G. Hamilton,
deceased,

Appellee.

vs.

CITY OF CHICAGO,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 614³

MR. JUSTICE CHIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$2448 against the City of Chicago, made up of the principal sum of \$1960, deposited with the City during the month of February, 1909, by David G. Hamilton in his lifetime, and interest on said sum at the legal rate of 5 per cent per annum from December 12, 1912, (when written demand for the return of the deposit was made) to December 4, 1923 (the day of the trial of the cause) amounting to \$488.

Plaintiff commenced her action in assumpsit on December 16, 1912, to recover said sum and interest. The sum was deposited under the terms of an ordinance passed by the city council of Chicago on February 1, 1909, which provided for the vacation and closing of certain streets and alleys contiguous and adjacent to certain lots and blocks mentioned, which said lots and blocks were owned jointly by David G. Hamilton and Edwin A. Casey. The ordinance made it a condition of said vacation that David G. Hamilton should file a copy of the ordinance in the office of the recorder of deeds of Cook County and pay to the City the sum of \$1960 "for the payment and satisfaction of any and all claims for damages done by the closing of said streets and alleys," and provided that such filing should be done and such payment should be made within 30 days after the passage of the ordinance.

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
IN CHARGE OF FINANCE

238 1. 614

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
IN CHARGE OF FINANCE

THIS IS TO CERTIFY THAT

THE CITY OF NEW YORK, BY THE COMPTROLLER IN CHARGE OF FINANCE, HAS RECEIVED FROM THE COMPTROLLER IN CHARGE OF FINANCE, THE SUM OF \$100,000.00, IN FULL PAYMENT OF THE DEBT OF THE CITY OF NEW YORK, DUE TO THE COMPTROLLER IN CHARGE OF FINANCE, ON THE 1ST DAY OF JANUARY, 1975.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL, AT NEW YORK, THIS 1ST DAY OF JANUARY, 1975.

JOHN J. BROWN, JR.
COMPTROLLER IN CHARGE OF FINANCE

Plaintiff's declaration consists of two special counts and the common counts. In the first special count the ordinance is pleaded according to its legal effect; in the second it is set forth in esse verba. And in each count it is averred in substance that David G. Hamilton accepted the terms of the ordinance and within 30 days after its passage filed a copy thereof with the recorder and paid said sum to the City; that in February, 1916, said Hamilton died, leaving a last will and testament in which plaintiff was nominated as executrix and made his sole residuary legatee; that in March, 1916, the estate was settled in the Probate court of Cook County and she was discharged as executrix, whereby she, as such residuary legatee, succeeded to all of said Hamilton's right, title and interest in said principal sum so deposited; that no claim or demand arising out of the vacation and closing of said streets and alleys has been presented to or made against the City, and no one has been injured or damaged because of such vacation and closing; that any claim for damages that might now be presented is barred by the statute of limitations, and the City became liable to pay plaintiff said principal sum; and that she has frequently demanded of the City the payment thereof, which demands have been refused. In the affidavit of claim attached to the declaration interest on said sum at the legal rate is claimed from December 12, 1918.

To the declaration the City filed eight pleas, and afterwards, by leave of court, an additional plea. The first was a plea of the general issue. The second was a plea of the statute of limitations of five years, to which plaintiff filed a replication alleging that the several causes of action did accrue to her within five years next before the commencement of the action. The 5th, 6th, 7th and 8th pleas set forth the inoperation of the statute of limitations as to certain persons, called John Doe, Jane Roe, etc., claimed to be under various

[illegible]

disabilities, to which pleas plaintiff filed replications. The 3rd and 4th pleas, and the additional plea, set forth defenses to the effect that the ordinance was illegal, that it was passed solely for the benefit of David S. Hamilton, that the money was paid to the City as compensation for the vacation of the streets and alleys, and that the transaction was an illegal one; that said payment was made with the knowledge of said Hamilton that both the ordinance and the transaction were illegal, and that, hence, plaintiff was not entitled to a return of the money. To these pleas plaintiff filed demurrers, which the court sustained, and the City elected to stand by the pleas.

By agreement the trial was had before the court without a jury. All the material facts, as alleged in the special counts, were either proved by plaintiff or admitted by the City. No evidence was offered by the City to sustain the allegations of its 5th, 6th, 7th or 8th pleas. When the ordinance was passed and said sum paid, and when plaintiff's action was commenced, the original act, passed in 1874, relating to the vacation of streets and alleys, was in force (Hurd's Stat. 1919, Chap. 145.) The amendments to the act mentioned in the printed brief and argument of counsel for the City, were passed in 1921 (Cahill's Stat. 1921) and in 1923 (Cahill's Stat. 1923). Certain provisions, contained in the act of 1921 and also mentioned by counsel, are not contained in the act of 1923. At the conclusion of the trial, December 4, 1923, the court found the issues for the plaintiff and assessed her damages at \$1960 (the amount originally deposited) and entered judgment against the City for that amount. Before the term had expired plaintiff moved that the finding and judgment be vacated and a new judgment entered, increasing it by the addition of interest on the amount deposited at the legal rate from December 12, 1918, to the date of the trial. The motion was granted, evidence was presented showing the amount of the interest to be \$488.

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and on January 3, 1924 a new finding and judgment against the City were entered in the sum of \$2445. This judgment was subsequently vacated, and on March 8, 1924, after overruling the City's motions for a new trial and in arrest of judgment, the judgment appealed from, in the same amount, was entered.

In view of the facts disclosed, and particularly in view of the provision of the ordinance of February 1, 1909, requiring the payment to the City of said sum of \$1960, "for the payment and satisfaction of any and all claims for damages done by closing of said streets and alleys," we are of the opinion that plaintiff is entitled to recover said sum from the City on the theory of an implied contract. It has been repeatedly so decided by our Supreme Court in similar cases. (Lackland & Strickland Co. v. Chicago, 279 Ill. 445; Smyth Co. v. Chicago, 294 Ill. 136; Teich v. Chicago, 298 Ill. 498.) The City's plea of the statute of limitations was not a good one. Plaintiff's cause of action for the recovery of the money did not accrue until the expiration of the period allowed for the presentation of claims for damages against the City, February 1, 1914, (Allis-Chalmers Co. v. Chicago, 297 Ill. 444), and her suit was commenced, and her declaration stating a good cause of action was filed, prior to the expiration of five years from that date. And the trial court did not err in sustaining the demurrers to the City's 3rd and 4th pleas and its additional plea, on the ground that the City was estopped to urge the illegality of the ordinance as a defense against the recovery of money so deposited. (Smyth Co. v. Chicago, *supra*; Teich v. Chicago, *supra*.)

And we are of the opinion that under the facts disclosed the court did not err in including in the judgment, as damages, interest at the legal rate on the sum deposited from the date of plaintiff's formal demand for its return. (County of La Salle v. Simmons, 19 Ill. 513, 530; Beveridge v. Park Commissioners, 100

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Ill. 75, 81; City of Danville v. Danville Water Co., 180 Ill.

235, 246; Conner v. City of Chicago, 237 Ill. 128, 137.) In the

last cited case, where an assumpsit action was brought against the

City to recover a balance due on special assessment bonds issued

in payment of the cost of paving certain streets, the Court said:

"This is not a suit upon the bonds in the sense that the recovery

must be according to the tenor and effect of the instruments, but

it is essentially a suit against the city for money had and re-

ceived to the use of appellee which in good conscience ought to be

paid to him. * * The general liability of appellant to pay interest

does not arise out of the contract, but out of the unlawful with-

holding of these funds after they were collected by the city. The

general rule as to the liability of municipalities is, that they are

not liable on their contracts for interest in the absence of an

express agreement to pay it, yet where money is wrongfully obtained,

or where it is lawfully obtained and unlawfully and wrongfully with-

held, the municipality is liable for interest to the same extent as a

private person." In the present case it is apparent that the amount

deposited with the City, \$1960, was unlawfully and wrongfully with-

held by the City after plaintiff's written demand for its return on

December 12, 1918. Furthermore, there is some evidence in the record

tending to show that the money had been withheld by the City "by an

unreasonable and vexatious delay of payment," mentioned in section 2

of the Interest Act as one of the grounds for the recovery of interest

at the legal rate.

For the reasons indicated the judgment of the Superior

court is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

THE UNITED STATES OF AMERICA
DO hereby certify that
the following is a true and correct
copy of the original as the same
exists in the records of the
Department of the Interior
at Washington, D. C.
this 10th day of June, 1901.

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HARRY HECHTMAN,

Appellee.

vs.

SIDNEY MORRIS & COMPANY,
a corporation.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 614⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$250 rendered after verdict by the Municipal Court of Chicago against defendant in a fourth class action in contract. The only ground urged for a reversal of the judgment is that the trial court erred in overruling defendant's motion for a new trial. This motion was supported by affidavits setting forth certain alleged newly discovered evidence. Defendant's counsel argue that if on a new trial this evidence were presented a verdict in defendant's favor would probably be returned. No brief and argument on plaintiff's behalf has been filed in this court.

It is alleged in the statement of claim that on December 24, 1921, defendant for a valuable consideration delivered to plaintiff a certificate for 25 shares of the capital stock of the defendant company, of the par value of \$10 per share. A copy of the certificate, duly signed and dated as of said date, is set forth, wherein it is certified that plaintiff (naming him) is "the owner" of said number of shares. Across the face of the certificate are the words, written in ink: "Not negotiable - not transferable." It is further alleged that when the certificate was delivered to plaintiff there was attached to it a letter or agreement as follows:

SECRETARY OF THE ARMY
WASHINGTON, D. C.
1945

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year 1890.

"Chicago, December 24, 1921.

Mr. Harry Hechtman,
Chicago, Ill.

Dear Sir:

We hand to you herewith twenty-five (25) shares of stock in the Sidney Morris Company. It is understood and agreed that this stock is not to be negotiable. It is further agreed that in the event that you leave the services of the Sidney Morris Company, or if your services are discontinued, you are to immediately surrender the stock certificate in question to the Sidney Morris Company. You are to be paid not to exceed ten dollars (\$10) a share for this stock.

(Signed) Sidney Morris & Company.

I hereby agree to accept all of the conditions as outlined in the above letter.

(signed) Harry Hechtman."

It is further alleged that immediately upon the discontinuance of his services with defendant he tendered to it the certificate and attached letter and demanded of it the sum of \$250, which demand was refused.

In its affidavit of merits defendant denied that plaintiff gave any consideration for the stock. It did not, however, deny the execution of the agreement. It alleged that plaintiff had agreed to pay for the stock in installments, but that he had made no payments thereon.

On the trial plaintiff was the only witness in his behalf, and Morris A. Pancee and William J. Pancee, president and secretary respectively of defendant, were the only witnesses for it. It appears that plaintiff was employed first by defendant in the year 1917 and continued working for it until July, 1920, when he left; that in December, 1920, at the solicitation of another one of the three Pancee brothers, he again entered defendant's employ; that after he had worked for more than a year he was given, on December 24, 1921, the stock certificate, and the agreement was entered into; and that about eight or nine days thereafter he finally ceased working for defendant. Plaintiff

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The first of the three years mentioned above is the year 1911. It was a year of great activity for the United States. The country was in the midst of a great industrial revolution. The new industries were growing rapidly. The old industries were being transformed. The country was becoming more and more united. The people were becoming more and more patriotic. The government was becoming more and more efficient. The year 1911 was a year of great progress for the United States.

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testified in substance that in a conversation had in December, 1930, with Morris A. Pancee and William J. Pancee, relative to the terms of his second employment, both stated that they wanted him to have "an interest in the business" and to purchase some of defendant's stock, that his salary would be \$45 per week and that "they would pay him \$35 a week and take out \$10 a week for stock;" that he accepted the proposition; and that thereafter and until he finally left defendant's employ he was paid in cash \$35 per week. Both Morris A. Pancee and William J. Pancee gave their versions of the conversation. They both admitted that they made statements to the effect that they desired plaintiff to acquire an interest in the business. William J. Pancee testified that he said at the time: "We will allow you stock of the concern after we see that your work is satisfactory." But both denied that the arrangement was that plaintiff's salary should be \$45 per week and that \$10 per week, or any other sum, should be deducted and applied as payments on stock. They claimed that they only agreed to pay plaintiff as a salary \$30 per week, and that that weekly sum was all that plaintiff received for his services during the year, yet they made no attempt to show by defendant's books, pay roll sheets or vouchers what was actually paid to him in cash each week during said year. Plaintiff further testified that no written memorandum of the terms of his second employment was made; that on December 24, 1931, after he had been working a year he was handed the stock, and was told: "This is yours now;" and that when Morris A. Pancee handed him the certificate and the letter Pancee said that "the stock was worth \$2 for each \$1."

^{the}
On/motion for a new trial the affidavits of defendant's bookkeeper and of the three Pancees were presented. It is stated in the bookkeeper's affidavit in substance that the payroll sheets of defendant for the entire period of plaintiff's second employment show that he was paid the weekly sum of \$30; that on January

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3, 1922, by direction of Morris A. Pancee, she paid to plaintiff \$30 in cash and took a receipt signed by plaintiff as follows: "Jan. 3, '22. Received of Sidney Morris & Co., \$30, in full pay for all claims to date," which receipt was placed among defendant's records; and that on October 26, 1923 (two days after the jury's verdict), acting under said Pancee's directions, she examined said records and found said receipt. It is stated in the affidavit of Morris A. Pancee in substance that, after the rendition of the verdict, "it occurred to affiant that perhaps an inspection of defendant's records would disclose the fact that said Hechtman received only \$30 per week at the time he stated he received \$35 per week;" that he ordered the bookkeeper to make such inspection which was made with the result as stated in her accompanying affidavit; that at the time of the trial affiant had no knowledge of the existence of said receipt; and that by the exercise of reasonable diligence he could not have known of its existence. The affidavits of William J. Pancee and Samuel Pancee were to the effect that they first learned of the existence of the receipt on October 26, 1923.

After reviewing the present transcript we are of the opinion that the trial court did not err in refusing to grant defendant's motion for a new trial on the ground of the alleged newly discovered evidence and in entering the judgment appealed from. It is apparent that defendant's officers or agents, by the exercise of ordinary diligence in preparing for the trial, could or should have found the pay-roll sheets and receipt in the company's records and papers prior to the trial. And whether plaintiff during the period of his second employment received in cash the weekly sum of \$30 or \$35 has no particular bearing on the main question, viz. - whether on December 24, 1921, plaintiff became the owner of the stock in question subject to the conditions mentioned in defendant's letter of that date, which he agreed to. It is undisputed that after plaintiff had worked for defendant for

1. The first of these is the fact that the Government has not yet decided whether or not it will accept the offer of the United States to purchase the Alaska Pipeline. This is a very important decision, as it will determine whether or not the United States will be able to transport oil from Alaska to the rest of the country. The Government has not yet decided whether or not it will accept the offer of the United States to purchase the Alaska Pipeline. This is a very important decision, as it will determine whether or not the United States will be able to transport oil from Alaska to the rest of the country.

more than a year the certificate of stock for the 25 shares was voluntarily given to him by defendant, subject to the conditions that plaintiff should not negotiate or transfer the stock, and that in the event plaintiff ceased working for defendant he should surrender the certificate and the stock to defendant, whereupon he was to be paid by defendant not to exceed \$10 per share. It is also undisputed that shortly after plaintiff ceased working for defendant he tendered to it said certificate and demanded compliance with said agreement, which demand was refused. And the evidence tended to show that at the time the value of the stock was in excess of \$10 per share. The defendant on the trial took the position that the fact that the certificate on its face bore the words "not negotiable - not transferable" was evidence tending to show that plaintiff had paid nothing for the stock. We do not think this follows. In view of the conditions under which plaintiff received the stock, as disclosed from said letter or agreement, the real reason for the writing of said words is apparent, namely, to prevent the stock going into the hands of strangers to the company. And we do not think that the fact, as stated in the affidavit of the bookkeeper, that when on January 3, 1922, plaintiff received \$30, he signed a receipt "in full pay for all claims to date," has any tendency to show that he then released his claim against defendant on the stock, which he had received a few days before subject to the conditions mentioned and which was of the value of at least \$250. The receipt was given in consideration of the \$30 and was evidently intended to evidence the fact that all his claims for salary to date had been liquidated. The receipt makes no mention of the stock which he then held. It is said by Lord Chancellor Hardwick in Rogers v. Hyton, 3 Vesey Jr. 306, 310: "It is certain, that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will

construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released." In Jackson v. Stockhouse, 1 Cowen (N.Y.) 122, 126, it is said: "Where there is a particular recital, and then general words follow, the general words shall be qualified by the particular recital. * * Thus, if a release acknowledges the receipt of 10 pounds, and thereof acquits and discharges the person of whom it is received, and also of all actions, debts and demands, by the release nothing is discharged but the 10 pounds; for the last words are limited by the first." (See, also, Turner v. Hart, 2 Conn. 120, 122; Bassett v. Lawrence, 193 Ill. 494, 498.)

The judgment of the Municipal court is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

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45 - 29448

ARTHUR G. ELLIOTT,

Appellant,

v.

BLANCHE ELLIOTT,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 614⁵

Opinion filed June 17, 1935.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On March 28, 1933, Arthur G. Elliott filed his bill for a divorce, in the Superior Court of Cook County, against his wife, Blanche Elliott, charging that she had wilfully deserted him on the 10th day of December, 1916. The defendant was served by publication only. She was apparently defaulted and on the 25th day of May, 1933, the cause was heard before the chancellor. Complainant and his brother testified and on June 10, 1933, a decree of divorce was entered. Nearly a year afterwards on May 31, 1933, the defendant by leave of court, filed her petition, setting up that she had not been notified of the divorce proceedings, asking that she be permitted to file an answer to the bill and stated that she could produce evidence to show that the decree was fraudulently obtained. She denied the desertion and prayed that the decree be set aside and vacated. Afterwards, on June 22, 1933, by leave of court, she filed her answer, in which she denied that she had deserted or abandoned the complainant on December 10, 1916, or any other time, but averred the fact to be that complainant had wilfully and with-

out cause deserted and abandoned her.

The cause came on for hearing July 13, 1933.

The complainant testified in his own behalf and the defendant, together with other witnesses called by her, also testified. Additional testimony was taken on the 18th of August, 1933, and on February 8, 1934, a decree was entered, wherein it was found that the defendant was served in the divorce suit under publication only and that she had a right under the statute to file her answer. The court further found that the defendant did not desert or abandon the complainant as he had alleged in his bill and as was found in the original decree and further found that that decree ought not to have been entered; that the equities of the cause were with the defendant and the decree of divorce was vacated, annulled and set aside and complainant's bill was dismissed for want of equity. From that decree the complainant prosecutes this appeal.

We think the court was misled in entering the original decree. The bill of complaint was sworn to by complainant, but the affidavit of non-residence is sworn to by the solicitor for the complainant and it is therein stated that the defendant's last known place of residence was No. 159 North Lockwood avenue, Chicago. On the original hearing complainant testified that he lived at No. 159 North Lockwood avenue, which apparently was the residence of his parents. He further testified that the last known residence of his wife was No. 3848 Wilcox avenue, Chicago. The court apparently overlooked the fact that the publication gave the wrong address and was, therefore, invalid. The evidence given on the original

hearing by complainant and his brother is set forth in the abstract, but we think it is not properly in the record, because it was not offered on the second hearing which was before another judge. So that the only evidence on behalf of the complainant on the hearing in which the decree appealed from, was entered, was that of complainant and, of course, complainant could not prove desertion by his own testimony. But, in any event, we think it clear that a consideration of all the evidence shows that the defendant did not desert the complainant, but that he deserted her as the court found by the decree in question. And a consideration of the record leads to the conclusion that the cause of the separation was not touched upon in the trial. The record discloses that the parties were married August 23, 1907, and the evidence offered on behalf of the complainant was to the effect that his wife deserted him in September, 1916; that in June, 1918, she went on a vacation to a lake in Michigan and returned sometime in September, when his contention is, that she refused to live with him; but the testimony of complainant was not consistent in this respect.

The defendant testified that prior to her returning in September, 1918, she advised her husband when she would reach Chicago so that he could meet her; that he did not do so and that she thereupon went to her parents' home on West Adams street; and then, for a number of days, endeavored to communicate with her husband by telephone where he lived and at his place of employment at the bank; that she called a number of times at the apartment where he lived, both day and evening, but was unable to gain any entrance; that finally a week after

her return and after she had called a number of times at his apartment, she forced an entrance and took away some of her effects.

The evidence further tends to show that the complainant had got into some financial difficulties with his employer and had lost his position; that about Thanksgiving time, he was given another position in Ohio and he agreed to take his wife with him and that she was willing to go, but before leaving he changed his mind and would not take her. He returned afterwards to Chicago about Christmas time, but made no endeavor to take up his residence with the defendant. On the contrary, the evidence shows that the parents of the parties endeavored to affect a reconciliation without success.

We have carefully considered all of the evidence in the record and are clearly of the opinion that the finding of the chancellor and the entering of the decree was the only finding that could be entered on the evidence in the record.

The decree of the Superior court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

83 - 29490

GUST EKONOMPOULOS, doing business
as EKONOMPOULOS & CO.,

Appellee,

v.

WILLIAM CLOUD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 615

Opinion filed June 17, 1935.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

Plaintiff brought suit against the defendant to
recover \$510.00 for commissions claimed to be due him for
obtaining a purchaser for defendant's restaurant. There
was a trial before the court without a jury and a finding
and judgment in favor of the plaintiff for the amount of
his claim and the defendant appeals.

The theory of the plaintiff, who was a real estate
broker, was that he had been employed by the defendant to
obtain a purchaser for the latter's restaurant for which he
was to be paid by the defendant 5 percent of the purchase
price; that he had obtained a purchaser for the restaurant
who was ready, able and willing to buy the restaurant upon
terms satisfactory to the defendant; that a written contract
was entered into for the purchase of the restaurant and, there-
fore, he was entitled to \$510.00, which was 5 percent of
\$10,200.00, being the purchase price of the restaurant. On
the other hand the defendant's theory was that he employed
plaintiff to obtain a purchaser for the restaurant and that
as a part of the agreement, the purchaser produced by plain-

2381.A.615

Opinion filed June 17, 1932.

THE COURT, after having read the petition and the answer, and after having heard the testimony of the parties, and after having considered the evidence, is of the opinion that the petition is not sustained.

It is the duty of the court to see that the law is properly administered, and that the rights of the parties are properly protected. In this case, the court finds that the petition is not sustained, and that the answer is sustained.

The court is of the opinion that the petition is not sustained, and that the answer is sustained. The court is of the opinion that the petition is not sustained, and that the answer is sustained. The court is of the opinion that the petition is not sustained, and that the answer is sustained.

tiff was to be satisfactory to the defendant's landlord who owned the building in which the defendant conducted his restaurant; that plaintiff failed in this respect, because the tenant was not financially responsible and the landlord refused to accept him, in lieu of the defendant, for that reason.

Plaintiff testified that he was a real estate broker and that the defendant came to his office and wanted plaintiff to obtain a purchaser for defendant's restaurant for \$10,500.00, the restaurant being located at No. 6845 South Halsted street, Chicago, which plaintiff agreed to do; that plaintiff obtained one James Doris, who was willing to buy the restaurant and it was agreed between the parties that the defendant would sell and Doris would buy the restaurant for \$10,200.00; that plaintiff then wrote up a contract which he took to defendant on the 31st of January and which the defendant then signed; that he left a copy of the contract with the defendant, took the contract which had been signed by the defendant to Doris and had him sign it; that on the next morning, February 1st, plaintiff telephoned the landlord who owned the premises in which the restaurant was located, with a view of having the landlord accept Doris as the new tenant, in accordance with the conversation of a day before with the defendant; that the landlord said he would accept Doris and assign the lease to him, if Doris would deposit six months' rent in advance or "\$1,000.00 of security"; that on the afternoon of the same day, plaintiff took Doris, the purchaser and the landlord in his automobile to defendant's restaurant on South Halsted street and talked about defendant turning over the restaurant to Doris, who had \$4,000. in cash with him to make the initial payment,- \$500.00 earnest money having previously been paid on the day the contract was made.

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1. The first of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

2. The second of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

3. The third of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

4. The fourth of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

5. The fifth of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

6. The sixth of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

7. The seventh of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

8. The eighth of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

9. The ninth of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

10. The tenth of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This is a serious matter, and it is the duty of the court to impose a sentence which is commensurate with the gravity of the offense.

He further testified that the landlord had previously told him he wanted \$1,000.00 of security^a or six months rent in advance; that at that time while they were in the restaurant talking the matter over with the defendant, the latter said he would go into the landlord's shop, which was next door, and see about transferring the lease to the new tenant; that after while defendant came back and said he could do nothing with the landlord; that the next morning, which was February 2nd, the witness went again to the restaurant and talked with the defendant about turning over the property; that the latter stated he was sorry, but could not do anything about it, because the landlord would not turn over the lease, which had a number of years to run, to the purchaser, Doris.

Doris testified that he had been in the restaurant business about twelve years; that he went to see plaintiff about buying a restaurant and then looked over defendant's restaurant; that this was about the middle of January; that finally they agreed upon a price of \$10,200.00, and the next day he gave plaintiff \$500.00 as a cash deposit; that on February 1st he went with plaintiff and the landlord to the defendant's restaurant on South Halsted street; that the landlord went into his own shop, which was next door to the restaurant and plaintiff and the witness talked to the defendant, the latter stating he was sorry he could not deliver the lease, because the landlord wanted security; that the parties then went to see the landlord and the latter said that he wanted a deposit of \$1,000.00 or six months rent paid in advance; that the landlord did not object to the witness as being a proper tenant for the place.

The defendant testified in his own behalf that about the 25th of January he went to plaintiff's office met Doris and the latter's lawyer and they finally agreed on the price and payments to be made for the restaurant; that at that time Doris asked the witness if the landlord would transfer the lease to him and in reply the witness said the landlord had asked him if Doris could furnish reasonable security on the lease and that the defendant had told the landlord that plaintiff had said to the witness that Doris had a rich uncle who would back him; that Doris said: "Oh, that part is all right, we'll take care of that"; afterwards, on January 31st, plaintiff came to the restaurant with a contract and a check for \$500.00; that the contract had not been signed by anyone; that defendant signed it and gave it to plaintiff, the latter leaving a copy; that plaintiff then left saying that "he and Doris were going to see the landlord the next day and find out what security he would require"; that the next day plaintiff called up and said that they had talked to the landlord, but had come to no agreement; that the following day plaintiff, Doris and the latter's lawyer came to the restaurant and said they had seen the landlord that day, but that the terms were not acceptable; that the defendant then went next door with Doris and his lawyer and saw the landlord and asked him what he wanted; that the latter replied that he had agreed to transfer the lease to Doris if Doris would deposit six months rent or \$1,000.00 as security, or if he would have some property owner sign the lease with him; that they then spoke about Doris' uncle, but Doris stated that the latter did not own any real estate; that they went back to the restaurant and asked plaintiff if he did not know some

property owner who would go on the lease with Boris; that plaintiff replied, "Why, I'm a property owner and will sign the lease with Boris"; that at that time the landlord had left his store next door and had gone home; that plaintiff then asked defendant to see the landlord and find out if he would accept plaintiff as security; that later in the same evening defendant called up the landlord and the latter stated he would accept plaintiff on the lease if he was a property owner; that the next morning he called plaintiff up and told him that the landlord would accept him if he owned property and suggested that plaintiff see the landlord which plaintiff said he would do; that afterwards, on the same day, the defendant talked with the landlord and the latter said plaintiff and others had come to his office too late in the day and had made an appointment to come the following morning, Monday, at ten o'clock, and on Monday afternoon plaintiff came to the restaurant and told the defendant that he could not agree with the landlord and wanted the deposit of \$500.00 back and that he was through with the deal; that defendant stated he would return the \$500.00 if the contract which he had signed was returned to him.

Sam More, the landlord, testified that he owned the premises in which the restaurant was located; that in the early part of January defendant asked him if he would transfer the lease in case the latter sold his restaurant; that he said he would if he was satisfied the purchaser was reliable; that on January 31st, plaintiff and others called at the defendant's place of business near Van Buren street and said they represented the party who was to buy the defendant's restaurant. Plain-

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a fresh blanket after a long, hot summer. I took a deep breath, savoring the scent of pine and the distant sound of water. The world seemed so quiet, so peaceful. I walked towards the lake, my feet crunching on the dry leaves. The water was a deep, dark blue, reflecting the sky and the surrounding trees. I stood on the shore, watching the gentle ripples dance across the surface. It was a beautiful sight, a moment of pure tranquility. I felt a sense of wonder and awe, as if I had discovered a hidden gem. The air was so clean, so fresh. I could see the reflection of the trees in the water, and the way the light played on the surface. It was a magical moment, one that I would never forget. I stood there for hours, watching the sun set behind the mountains. The sky was a mix of orange, pink, and purple, painting a picture of pure beauty. The water was still, reflecting the colors of the sky. It was a sight to behold, a moment of pure magic. I felt a sense of peace and serenity, as if all my worries and problems were far away. The world seemed so small, so insignificant. I was in the presence of something greater, something beautiful. I took another deep breath, feeling the cool air fill my lungs. It was a moment of pure bliss, a moment of pure joy. I smiled at the thought, knowing that I had found what I was looking for. The world was so beautiful, so perfect. I felt a sense of gratitude, as if I had been blessed with a second chance. The air was so clean, so fresh. I could see the reflection of the trees in the water, and the way the light played on the surface. It was a magical moment, one that I would never forget. I stood there for hours, watching the sun set behind the mountains. The sky was a mix of orange, pink, and purple, painting a picture of pure beauty. The water was still, reflecting the colors of the sky. It was a sight to behold, a moment of pure magic. I felt a sense of peace and serenity, as if all my worries and problems were far away. The world seemed so small, so insignificant. I was in the presence of something greater, something beautiful. I took another deep breath, feeling the cool air fill my lungs. It was a moment of pure bliss, a moment of pure joy. I smiled at the thought, knowing that I had found what I was looking for.

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20246

tiff asked the witness if he had any objection to transferring the lease in case the restaurant was sold; that the witness replied he had no objection, but he first must know if the new man was responsible, to which plaintiff replied, "they could fix that"; that plaintiff then said that he would come that afternoon and take the witness out to the restaurant where they could discuss the matter; that he came about five o'clock and plaintiff, Doris, and the latter's lawyer, rode out to the restaurant; that he asked Doris as to his financial standing and after Doris gave certain information the witness said he would not take Doris on the lease, which had four years to run, on account of the financial standing and they said, "they thought they could satisfy me with some security"; that the witness said he thought Doris should deposit \$1,000.00 as security or pay six months rent in advance; that he told them in reply to a question that he would accept Doris if some one would sign the lease with him; that the next day which was Saturday, plaintiff, Doris and the latter's attorney came to the witness' store on Van Buren street and stated that plaintiff owned a house and that he would sign the lease with Doris; that it was too late that day because the court house was closed and the witness could not reach his lawyer, so they agreed to come back Monday at ten o'clock; that he waited all day Monday, but he had not seen them since.

The contract provided: "The vendor further agrees to procure for the purchaser directly or by transfer, a lease for the period of four years and five months at the present rent of \$150.00, and one year at \$175.00 and four years option with the rent not to exceed more than \$200.00 a month."

It is a very common mistake to think that the only way to get a good education is to go to a university. In fact, there are many other ways to get a good education. For example, you can take courses at a community college, or you can take courses at a technical school. You can also take courses at a vocational school, or you can take courses at a trade school. There are many other ways to get a good education, and it is important to know what your options are. If you are interested in getting a good education, you should talk to a counselor or a teacher. They can help you decide what is the best way for you to get a good education.

Plaintiff contends that since there were no written propositions of law submitted to the court, no questions except those raised on the admission or exclusion of evidence were open for consideration. Propositions of law are not necessary to preserve questions for review in this court. P. C. C. & St. L. Ry. v. Chicago Ry., 300 Ill. 162; Rothwell v. Taylor, 303 Ill. 228.

The evidence offered on behalf of the plaintiff as well as that on behalf of the defendant all tends to show that both parties interpreted the contract to mean that plaintiff was required to satisfy the landlord that the purchaser, Doris, would be financially satisfactory to the landlord or that he would see that security satisfactory to the landlord was given by Doris. Plaintiff failed to do this and, therefore, he has not earned his commission. Plaintiff himself testified, as above stated, to certain matters and things he said and did, both before and after the contract was signed, which show that he considered that before he would be entitled to a commission, he would have to produce a purchaser which was acceptable to the landlord. The defendant and the landlord both testified that the landlord agreed to accept Doris and turn over the lease to him, if plaintiff or Doris would have a property owner go on the lease with Doris and they agreed to do so. This is uncontradicted. Plaintiff having failed to perform his contract, as all the evidence shows, the finding should have been for the defendant.

Moreover, even if the parties had rested on the written contract entered into by the terms of which the

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THE SIXTH OF THESE IS THE FACT THAT THE

defendant undertook to procure a transfer of his lease to the purchaser, the evidence is such as to show that there could be no recovery, because at no stage of the proceedings did the plaintiff or the buyer call upon the defendant to comply with that undertaking, but on the other hand, it is shown by the uncontradicted testimony in the record, that after the plaintiff and the purchaser had made efforts to comply with the requirements of the landlord and had been unable to do so, the plaintiff abandoned the deal entirely by going to the defendant and telling him that he and the purchaser had not been able to meet the landlord's terms, demanding the return of the earnest money and telling the defendant that they were through with the deal.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

THOMSON AND TAYLOR, JJ. CONCUR.

There is a great deal of talk about the "new" and "old" of the world, but it is all very much the same. The world is always the same, and the only change is in the way we look at it. The world is a great big place, and it is full of things that we do not understand. But if we only look at it with a clear mind, we can see that it is all the same. The world is a great big place, and it is full of things that we do not understand. But if we only look at it with a clear mind, we can see that it is all the same.

• *Journal of the American Medical Association* 283:1211-1212, 2000

94 - 29503

WILLIAM G. TENNANT,

Appellant,

v.

P. W. A. DORIGAN, PHILLIP
LA MANTIA AND JOHN DOE,

PHILLIP LA MANTIA,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 615²

Opinion filed June 17, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against the defendants to recover the possession of one Jordan automobile of the value of \$1500.00. There was a trial before a judge and a jury and a verdict rendered in favor of the defendants. Afterwards a new trial was granted and the case was again heard before the court without a jury. The suit was dismissed as to the defendants P. W. A. Dorigan and John Doe, and there was a finding that the defendant Phillip La Mantia was the owner and had the right to the possession of the automobile, and it was ordered that the plaintiff return the automobile, which was taken on the writ, to the defendant La Mantia within ten days, or in default thereof, that a writ of retorno habendo issue.

The material facts as disclosed by the evidence are not in dispute and so far as it is necessary to state them, they are as follows: The defendant, La Mantia, was

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Opinion filed June 17, 1944.

THE COURT OF APPEALS

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a South Water street merchant and was using an Elgin automobile which he desired to sell. He saw an advertisement in the newspaper where it was stated such machines were sold. The advertisement was Dorigan's and La Mantia took his Elgin automobile to Dorigan's place of business, which was on the south side of Chicago and left it for sale, for which he was to receive \$1200.00 net. Dorigan told him that he would sell the Elgin car within a few days. After leaving the car, La Mantia kept in touch with Dorigan by telephone and within a few days after the machine had been left, he was advised by Dorigan that the machine was practically sold and that La Mantia should call the next day for his money. La Mantia did this, but found that Dorigan's place of business was closed, the automobile gone and sixteen or seventeen other automobiles which he had seen there a few days previous were also gone and he was unable to locate Dorigan. About six months afterwards, La Mantia accidentally saw Dorigan on Wabash avenue. He stopped Dorigan and was about to call the police to have him arrested when Dorigan told him that if he would give him a chance, he would pay the \$1200.00 which he owed for the Elgin automobile, and after some conversation this was agreed to. Dorigan at that time was engaged in selling second hand automobiles and told La Mantia that he was about to get the agency to sell new automobiles. They became very friendly and saw each other frequently. La Mantia stated that he wished to purchase a new automobile and Dorigan stated that if he would wait while until Dorigan was able to secure the agency, he would sell La Mantia a car and give La Mantia the amount of commission Dorigan was to receive and thereby pay part of the \$1200.00. After some

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further conversation between the parties Dorigan suggested that La Mantia buy a Jordan automobile which make was for sale by the Chicago Motor Car Co., No. 2430 South Michigan avenue, Chicago. Dorigan and La Mantia went to that concern's place of business and examined the Jordan machine and Dorigan placed an order for a new Jordan automobile, introducing La Mantia to the officials of that company as one of his prospects, and it was understood that the car ordered by Dorigan was to be turned over by Dorigan to La Mantia. Prior to that time Dorigan had sold some second hand cars for the Chicago Motor Car Co. The price of the Jordan car was \$2465.00. The Motor Car Company did not have the car in stock when the order was given, but agreed to get it, and therefore, Dorigan and La Mantia called repeatedly to see if the car had arrived and went so far as to say that unless the car was delivered in the near future, the order would be withdrawn. After the order was placed and before it was delivered, La Mantia made payments at different times, amounting to several hundred dollars, to Dorigan on account of the car. Some of this money was turned over to the Chicago Motor Car Company on account of the purchase price and some of it was fraudulently converted by Dorigan to his own use. On June 14, 1923, the Chicago Motor Car Company received the Jordan automobile and advised Dorigan and La Mantia to this effect and they agreed to go together on the morning of the 15th to get the car. Dorigan did not keep his appointment but went alone to the Motor Car Company, gave his check to that company for about \$1100.00 and borrowed \$1200.00 from plaintiff, who was engaged in the business of loaning money on automobiles secured by chattel

The first of these is the fact that the company has been in business for a long time, and has a good reputation. The second is the fact that the company has a large capital, and is able to pay dividends. The third is the fact that the company has a good management, and is able to handle its business efficiently. The fourth is the fact that the company has a good location, and is able to attract customers. The fifth is the fact that the company has a good product, and is able to sell it at a profit. The sixth is the fact that the company has a good service, and is able to satisfy its customers. The seventh is the fact that the company has a good future, and is able to grow its business. The eighth is the fact that the company has a good reputation, and is able to attract investors. The ninth is the fact that the company has a good management, and is able to handle its business efficiently. The tenth is the fact that the company has a good location, and is able to attract customers. The eleventh is the fact that the company has a good product, and is able to sell it at a profit. The twelfth is the fact that the company has a good service, and is able to satisfy its customers. The thirteenth is the fact that the company has a good future, and is able to grow its business. The fourteenth is the fact that the company has a good reputation, and is able to attract investors. The fifteenth is the fact that the company has a good management, and is able to handle its business efficiently. The sixteenth is the fact that the company has a good location, and is able to attract customers. The seventeenth is the fact that the company has a good product, and is able to sell it at a profit. The eighteenth is the fact that the company has a good service, and is able to satisfy its customers. The nineteenth is the fact that the company has a good future, and is able to grow its business. The twentieth is the fact that the company has a good reputation, and is able to attract investors.

mortgages, whereas money was paid to the automobile company, being the balance of the purchase price. He executed a chattel mortgage to plaintiff on the automobile after he had obtained a bill of sale from the Motor Car Company and left with the car. When Dorigan had failed to keep his appointment with La Mantia, the latter became suspicious and called up his lawyer about the matter. He advised that La Mantia take the matter up with the Motor Car Company to ascertain whether Dorigan had paid for the automobile and to search the records to see if there was a chattel mortgage on the car. La Mantia had the Motor Car Company called up and was advised that Dorigan had taken the car and paid for it in full. He also had an examination of the chattel mortgage records made and found that no chattel mortgage had been recorded. About 2:30 in the afternoon of the same day, June 15th, Dorigan drove the car to La Mantia's place of business on South Water street and delivered it to him, turning over the bill of sale that he had received from the Motor Car Company and received from La Mantia the balance of the purchase price of the car - about \$400.00.

The examination of the records made by La Mantia to ascertain whether there was a chattel mortgage on the automobile, appears to have been on the following Monday or Tuesday, since the 15th was Saturday and the recorder's office was closed during the afternoon of that day. La Mantia used the automobile and about six weeks thereafter, when the first installment of the note, secured by the chattel mortgage given by Dorigan to the plaintiff, Tennant, became due and was not paid, Tennant went to see La Mantia and told him he had a

chattel mortgage on the automobile. He demanded possession of it under his mortgage and this being refused, the replevin suit was brought and the machine taken on the writ and delivered to Tennant. Dorigan was a scoundrel and disappeared immediately after he had delivered the car to La Mantia. The check for about \$1100.00 which he gave to the Motor Car Co. was worthless. He gave a check to La Mantia for \$400.00 at the time he delivered the machine to him which he stated was the commission he received from the Motor Car Company and which he gave to La Mantia on account of the \$1200.00 he owed him for the Elgin automobile. This check was also worthless.

The foregoing facts as shown by the record are undisputed. The only dispute in the evidence was that a witness for the Motor Car Company testified that La Mantia said before the order was given for the machine and before it was delivered that he and Dorigan were buying the automobile together. This was expressly denied by La Mantia and the witness who testified on this matter, at the time, admitted that he made no mention of this fact when the case was tried the first time.

The chattel mortgage provided that the automobile might be retained by the mortgagor, Dorigan, and since it was not recorded and La Mantia had no notice of the existence of such mortgage when he obtained the car from Dorigan, the mortgage was invalid as to him. In these circumstances, it is obvious that the evidence would warrant only a judgment in favor of La Mantia. Any other finding would be contrary to all the evidence.

The judgment of the Superior Court of Cook County
is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

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THE UNIVERSITY OF CHICAGO PRESS

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THE UNIVERSITY OF CHICAGO PRESS

CHICAGO, ILL.

118 - 22527

ABE LOBELL,

Appellee,

v.

CARL M. WHITE,

Appellant.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

233 I.A. 615³

Opinion filed June 17, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of trespass vi et armis against the defendant to recover damages for an alleged assault and battery. There was a verdict and a judgment in his favor for \$2500.00 and the defendant appeals.

The record discloses that plaintiff during 1916 and 1917 borrowed money from the defendant and had not repaid it all on September 3, 1919. When the parties met at that time there was an altercation in which plaintiff was struck, knocked down and kicked by the defendant, and it is on account of that assault that plaintiff sued. It further appears that the difficulty between the parties occurred about six o'clock on the evening of September 3, 1919, in front of the Brevoort Hotel, on Madison street, Chicago. At that time plaintiff was about twenty-two years of age and the defendant about thirty-nine years old. Plaintiff testified that he then weighed about 120 pounds and the evidence tends to show that the defendant weighed about 240 pounds. It further appears from the evidence that plaintiff had been working at a number of downtown hotels as bell boy;

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that about two weeks prior to the assault, he was discharged by one of the hotels on account of his wages being garnisheed by the defendant. Plaintiff testified in his own behalf that at the time of the assault he was standing on the sidewalk in front of the Brevoort Hotel, about six o'clock in the evening, when the defendant came walking by, swore at plaintiff and asked him when he was going to pay defendant the money due and owing; that plaintiff replied that he would do so as soon as he was able; that he had lost his job on account of his wages being garnisheed by the defendant; that he would pay him what he owed him, but would not pay the \$75.00 interest claimed; that the defendant then said: "You will pay me or I will kill you." and then struck plaintiff a blow with his fist, knocked him down and kicked him; that he was rendered unconscious and taken to a nearby hospital, where a surgeon was required to make three or four stitches; that his chin was bandaged for two or three weeks thereafter and that there was still a scar on his face. On cross-examination plaintiff testified that at the time of the trial, March 4th, 1934, he was 5 feet 11 inches in height, twenty-six years old, had gained about forty pounds and had grown four inches in height since the time of the assault.

Usher L. Wilkinson called by plaintiff testified that he saw the altercation; that plaintiff was standing near the hotel when the defendant came along, walking on the sidewalk, called plaintiff a vile name and said unless the plaintiff paid the defendant, he would kill him; defendant then hit plaintiff a blow with his fist, knocking plaintiff down in the alley and then kicked him in the face; that plaintiff was unconscious and some one came and helped him up;

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that he was bleeding from the mouth and that a crowd of people gathered around. On cross-examination, this witness gave testimony that materially weakened what he had testified to, in that he swore he had not talked to anybody about the occurrence and gave other testimony which need not be adverted to here.

For the defendant, Roy A. Martin testified that at the time of the occurrence, he was in a restaurant just west of the hotel; that he saw a crowd gather and saw plaintiff after defendant with a knife in his hand. This was after the assault.

John Luttenberger called by the defendant, testified that he knew White seven or eight years and saw the assault; that he came out of a restaurant directly across the street from the hotel and "saw White hitting a man and then he took his foot and knocked him down;" that after White knocked him down he kicked him; that blood was pouring out of plaintiff's mouth; that plaintiff started after the defendant with something in his hand which the witness thought was a knife.

The defendant testified that he had been engaged in the business of loaning money for about sixteen years; that he was forty-three years old, five feet eleven and a half inches high and weighed about 345 pounds; that ^{he} was about the same height and weight when the assault occurred; that he was blind in the left eye and had been since he was 21 years of age; that on the evening in question he was on his way home, walking in Madison street and when he got in front of the Brevoort Hotel plaintiff stepped up to him and patted

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him on his left shoulder and said: "'I suppose you know me.' I says, 'Well, now, I just cannot place you, I seen you recently and had some transaction with you, but what your name is I cannot recall just now.' 'The hell you don't,' he said. 'I am Abe Lobell.' I said, 'Oh, now I know you, the reason I did not recognize you is because I had seen you two weeks previous in the La Salle Hotel. At that time you stood behind the counter, behind the mailing division with your hat off and shirt sleeves. Today you have your coat on and I did not recognize you.' He says, 'I want to tell you something. I am sick and tired of you loan sharks hounding me around from job to job. I just had a brother killed in France, and I don't give a damn how soon I string and I would just as soon string for killing a loan shark as for any purpose.'" That defendant then said he did not want to have any argument in the street, but suggested that plaintiff come to defendant's office to adjust matters; that plaintiff had abused defendant in the Hotel La Salle a few weeks prior as a result of which defendant garnisheed plaintiff's wages; that thereupon plaintiff called the defendant a vile name; that defendant then started to proceed on his way home when plaintiff struck at him and the two then got into a fight; that plaintiff kicked at the defendant; that in the altercation defendant struck the plaintiff and probably kicked him; that after defendant knocked plaintiff down, he started on his way and saw plaintiff coming after him with his coat off and a knife in his hand. This is substantially all the evidence in the record.

We have gone into it rather fully, because defendant

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contends that the verdict and judgment is against the manifest weight of the evidence. We think that what we have said above clearly shows that the question whether plaintiff or defendant was at fault was one for the jury to determine and after a careful consideration of the evidence, we are unable to say that the jury's verdict in favor of the plaintiff is against the manifest weight of the evidence. It is true that the testimony of the plaintiff is not all to be believed. His testimony that he grew four inches in height from the time of the assault until the trial and the record discloses that he was about twenty-two years of age at the time of the assault, of course, is not to be taken seriously. Nor is the testimony of the defendant as to what occurred just prior to the assault to be taken literally as will appear from a consideration of the evidence which we have set forth above. In these circumstances, considering all the evidence, it is clear we would not be warranted in disturbing the verdict of the jury on the ground that it is against the manifest weight of the evidence.

The defendant next contends that counsel for plaintiff in his argument to the jury used improper and prejudicial language and that the judgment ought to be set aside on that account, and it is pointed out that during his argument, counsel for plaintiff referred to defendant as a "loan shark" and that plaintiff had been in the navy and had grown four inches since he was 21 years of age, and a further complaint is that counsel for the plaintiff referred to the defendant as a "big brute". The record discloses that the defendant himself in testifying brought the term "loan shark" into the record, and if, as there

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was evidence tending to show, at the time of the assault defendant weighed 240 pounds, was 39 years old and was about five feet eleven inches in height, while the plaintiff was but 21 years of age and weighed about 120 pounds and was assaulted by the defendant, then we think no exception could be taken to the argument of counsel for plaintiff, and certainly it is not such as would warrant us in disturbing the verdict and judgment.

Complaint is made that the court erroneously refused to give an instruction requested by the defendant and that it was held in the Illinois Steel Co. v. Higgins, 161 Ill. App. 535 to be reversibly erroneous where a similar instruction was refused. The court modified the requested instruction and as modified the jury were told that even if they believed that the defendant used more force than was absolutely necessary at the time of the occurrence complained of, still there could be no recovery if the jury believed from the evidence that the defendant acted as a reasonably careful man would have acted under the same circumstances and conditions. The issue in this case was simple and not complicated and the jury were clearly told that, although they might find that defendant used more force than was necessary, yet if he acted as a reasonable man would have acted under the circumstances presented, no recovery could be had. We think the error, if any, in refusing the instruction was not of such a character as would warrant us in reversing the judgment.

It is further insisted that the damages are excessive in that plaintiff was only slightly injured; that the defendant used no weapon; that plaintiff sustained but slight pecuniary

loss and there was no evidence of the defendant's financial standing. The court instructed the jury that in fixing the damages, they might give exemplary damages not only to compensate plaintiff, but to punish defendant and to deter others from the commission of like offenses. In an action for assault and battery to recover damages where the pecuniary worth of the defendant is not proven, "the jury have no right to give any more damages than they would if it had affirmatively appeared that the defendant was without pecuniary resources.

T.W. & W. Ry. Co. v. Smith, 57 Ill. 517; Mullin v. Spangenberg, 112 Ill. 140, 146." Beeson v. H. W. Gossard Co., 187 Ill. App. 561. Plaintiff in his argument on this point in part justifies the amount of the verdict on the ground that plaintiff was disfigured as a result of the assault by having a scar on his chin. We think that it appears the jury must have principally considered the element of punishment, and if they believed plaintiff's version of the altercation, we cannot say that the amount is so excessive as to warrant interference on our part.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

173 - 29589

GEORGE HORNETEIN,

Appellee,

v.

A. H. RANES,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 615⁴

Opinion filed June 17, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, the payee of a promissory note made by the defendant, brought suit to recover the face value of the note, \$236.60, with interest. There was a finding and a judgment in plaintiff's favor for the face value of the note and the defendant appeals.

The record discloses that on October 11th, 1920, the defendant made and executed his promissory note for \$236.60, payable ninety days after date to the order of plaintiff. The defendant filed an affidavit of merits in which he set up that he executed the note without consideration; that he executed and delivered the note to plaintiff in payment of the amount due plaintiff for printing briefs for the defendant in a certain law suit in which the defendant was counsel; that the defendant entered into a contract for the printing of the briefs with a representative of plaintiff whereby it was agreed that plaintiff was not to receive any payment for the printing of the briefs until the law suit in which the briefs were printed was finally disposed of. The affidavit of merits further set

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Opinion filed June 17, 1985.

THE FOLLOWING OPINION WAS FILED:

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On June 17, 1985, the court was presented with a motion for summary judgment. The motion was filed by the defendant, who sought summary judgment on the basis of the facts and circumstances set forth in the motion. The court, after reviewing the motion and the supporting affidavits, concluded that summary judgment was appropriate. The court found that the facts and circumstances set forth in the motion were undisputed, and that the law was clear. Therefore, the court granted summary judgment in favor of the defendant.

The court further found that the defendant's motion was timely filed, and that the court had jurisdiction to grant summary judgment. The court also found that the defendant's motion was supported by the facts and circumstances set forth in the motion. The court concluded that summary judgment was appropriate, and granted summary judgment in favor of the defendant. The court's decision was based on the facts and circumstances set forth in the motion, and the law. The court found that the facts and circumstances set forth in the motion were undisputed, and that the law was clear. Therefore, the court granted summary judgment in favor of the defendant.

up that afterwards plaintiff called at defendant's office and represented to defendant that he had retired from the printing business and desired to have some written memorandum of the amount due and owing him, and thereupon the defendant executed the note in question; that plaintiff there stated that he would make no demand for payment of the note until the suit in which the briefs were filed was disposed of. And it was averred in the affidavit of merits that the suit in which the briefs were filed was still pending.

A great many contentions are made by both parties, most of which have nothing to do with the case before us, and therefore, we will not comment upon them, for it is clear that the judgment in the instant case was properly entered.

The note in suit was the ordinary form of promissory note and the evidence offered on behalf of the defendant tending to show that it was not payable within ninety days as the note specified, but on the contrary, that it was not to be paid until certain litigation was disposed of was clearly inadmissible as it would vary the terms of the written instrument in violation of the parol evidence rule. Weinstein v. Harints, No. 28513, Appellate Court, First District; Schultz v. Meyer, 181 Ill. App. 335; Fox v. Blackstone, 31 Ill. 538; Fanny v. Graves, 13 Ill. 287; Lane v. Sharpe, 3 Scam. (4 Ill.) 586; Harlow v. Boswell, 15 Ill. 57; Harris v. Calbraith, 43 Ill. 309; Weaver, Admr. v. Fries, 35 Ill. 356.

In the Lane case it was sought to vary the terms of

A great many considerations are made up of such questions
 and in which have nothing to do with the case before us.
 And therefore, we will not comment upon them. For it is
 clear that in judgment in the highest court we are

THE COURT IN THIS CASE HAS CONSIDERED THE EVIDENCE AND THE
LAW AND HAS REACHED THE FOLLOWING CONCLUSIONS:
1. THE DEFENDANT IS GUILTY OF THE CHARGE.
2. THE DEFENDANT IS SENTENCED TO THE PENITENTIARY FOR
A TERM OF YEARS.
3. THE DEFENDANT IS TO BE RELEASED ON BOND FOR
A PERIOD OF MONTHS.
4. THE DEFENDANT IS TO BE RELEASED ON BOND FOR
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a promissory note by parol evidence and it was held that such evidence was inadmissible. Mr. Justice Caton stated -
"It makes that which is by the writing clear, certain, positive and conclusive, uncertain and contingent."

In the Foy case, which was also a suit on a promissory note, Mr. Justice Breeze in delivering the opinion of the court said that "Proof must not go to the extent of varying the terms of a note absolute on its face, showing that though on its face, it was given for one purpose, yet in truth and in fact it was given for a different purpose."

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

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subject was wearing a dark suit, a white shirt and a dark tie.
The subject was standing in front of a building and was looking
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The photograph of the subject was taken on the 10th of
January, 1960.

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183 - 29600

STEPHEN J. SKRIBA,

Appellee,

v.

ADOLPH CHALOUFKA,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 615⁵

Opinion filed June 17, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, a real estate broker, brought suit against the defendant, claiming there was \$600.00 due him as commissions for obtaining a purchaser for a piece of real estate belonging to the defendant. In his statement of claim, plaintiff alleged that he was a real estate broker and employed by the defendant to secure a purchaser for a certain piece of property owned by the defendant "for which property the defendant agreed to accept the net price of \$4200.00" and that the defendant agreed to pay the plaintiff all that was received for the property in excess of \$4200.00. And he further alleged that he procured one John Pawcek, who agreed to purchase the premises at a price of \$4200.00 "by assuming and accepting a \$2,000.00 first mortgage, by payment of \$1000.00 cash, by giving back to said defendant a second mortgage in the sum of \$1200.00 and by conveying to said defendant certain vacant property situated in the Village of Lyons at a price of \$600.00; that plaintiff submitted this proposition to the defendant and the latter accepted it and instructed

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3381A. 615

Opinion filed June 17, 1985.

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plaintiff to prepare the necessary contract." Plaintiff further avers that afterwards the defendant in violation of his agreement, sold the premises to Pavcek upon the conditions and terms above mentioned, but refused to pay plaintiff in accordance with the terms of the contract the sum of \$500.00.

The defendant filed an affidavit of merits wherein he denied that plaintiff had procured a purchaser for the property who was ready, willing and able to purchase in accordance with the agreement entered into between plaintiff and defendant. The case was tried before the court without a jury and there was a finding in plaintiff's favor for \$400.00.

The evidence produced on the trial is in the record in narrative form and the trial judge certifies that it contains a full, true and complete statement of the facts and proceedings presented on the trial. From this it appears that plaintiff testified in substance that the defendant listed with him for sale a certain piece of real estate for a net price of \$4200.00 and agreed to give plaintiff anything obtained for the real estate over and above \$4200.00; that he submitted the property to John Pavcek and that the latter offered to give for the property four lots, to pay \$1,000.00 in cash, give a second mortgage on the property for \$1300.00, and assume a mortgage which was then on the property of \$2000.00; that plaintiff reported the offer to the defendant and the latter stated he would make the sale, provided plaintiff would take the lots for his commission, which plaintiff declined to do. The evidence shows that later

the defendant apparently not knowing that Pavcek was the plaintiff's customer, got in touch with the same customer through another broker and ultimately made a deal with him, but the evidence shows that the terms of that deal were materially different from those which had been offered the defendant by Pavcek the customer through the plaintiff. The deal which the defendant closed with Pavcek, involved a conveyance of eight lots in Lyons to the defendant by Pavcek instead of four and the second mortgage to be placed on defendant's property by Pavcek was fixed at \$1000.00 instead of \$1200.00. Moreover, it does not appear whether the defendant paid the broker in that deal his commission in lots or whether he paid him in commission.

There is no dispute in the testimony given by both parties to this case, as to the terms submitted by the plaintiff. So far as the evidence shows, the defendant in listing the property with the plaintiff, made a price of \$4200.00 but it is not shown whether that agreement involved anything but cash. When the plaintiff submitted a deal which involves only \$1000.00 in cash and the balance in mortgages and vacant property, the defendant in our opinion was justified in rejecting the offer or making it conditional, as he did, upon the plaintiff's acceptance of the lots in lieu of a commission. Plaintiff having failed to produce a purchaser who was ready, able and willing to buy upon the terms agreed upon between him and the defendant is not entitled to a commission.

The judgment of the Municipal Court of Chicago is

reversed.

REVERSED.

THOMPSON AND TAYLOR, JJ. CONCUR.

12 - 29390

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

WILLIAM BLACKWELL,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 616

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

We have this day handed down an opinion in the
case of The People of the State of Illinois v. Charles
Beckwith, General Number 29391, which is decisive of this
case. Practically the same facts and the same law are
involved in both cases.

In the instant case, the charge being larceny,
the record shows that the evidence failed to prove that
anything whatever was stolen by the defendant, and, fur-
ther, failed to show the venue of the offense charged.

The judgment, therefore, will be reversed.

REVERSED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

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THE SECRETARY OF THE BOARD OF
HEALTH

DEPARTMENT OF HEALTH

OFFICE OF THE

COMMISSIONER OF HEALTH

NEW YORK

RECEIVED

DEPARTMENT OF HEALTH

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Opinion filed June 17, 1900.

ALL RIGHTS RESERVED BY THE BOARD OF HEALTH

NEW YORK

It is the duty of the Board of Health to

protect the public health and to

prevent the spread of disease.

It is the duty of the Board of Health to

prevent the spread of disease.

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prevent the spread of disease.

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prevent the spread of disease.

It is the duty of the Board of Health to

13 - 29391

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

CHARLES BECKWITH,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 616

Opinion filed June 17, 1935.

MR. JUSTICE TAYLOR delivered the opinion
of the court.

On February 20, 1934, Richard J. Ullen filed an information in the Municipal Court of Chicago stating that one Charles Beckwith on February 18, 1934, in the City of Chicago, County of Cook and State of Illinois "did then and there steal, take and carry away United States currency of the value of \$14.50, the personal goods and property of Richard J. Ullen," contrary to the statute in such case made and provided.

On February 20, 1934, the defendant signed a jury waiver, and on the next day there was a trial before the court, without a jury, and the defendant was found guilty of the criminal offense of larceny of property of the value of \$14.50, and sentenced to confinement and labor in the House of Correction for the term of one month and to pay the Clerk of the Court a fine of \$1.00, and also the court costs taxed at \$6.00. Motions for a new trial and in arrest of judgment were

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Page 1 of 1

THE UNITED STATES OF AMERICA

DO hereby certify that

ON

THIS

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IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said State, at the City of New York, this 19th day of 19.

GOVERNOR

overruled. This appeal is from the above mentioned judgment. No brief has been filed for the People.

The record shows that before the examination of witnesses, counsel for the defendant moved to quash the information, and that the motion was overruled.

Two witnesses were called on behalf of the People, Richard J. Ullen, and Daniel Creedon, a policeman. Ullen testified that he got on a crowded State Street car, and was standing on the inside of the car near the door, when he felt someone reach into his left-hand hip pocket; that he put his hand into his pocket and found his pocketbook was gone; that he then saw the defendant standing behind him, and a policeman standing next to the defendant, and he, the witness, said, "Who got my pocketbook?" that then the policeman grabbed the defendant and searched him thoroughly, but did not find the pocketbook on him; that then the police officer grabbed hold of a man by the name of Blackwell, and searched him, but did not find the witness's pocketbook on him; that "we then looked around and my pocketbook was found on the floor where this man (pointing to William Blackwell) had been standing;" that he, the witness, then told the policeman that the pocketbook which had been picked up off the floor was his; that it belonged to him, the witness. He further testified that he did not know who took his pocketbook, but that the defendant at the time was standing behind him, with the policeman behind Blackwell, and Blackwell standing at his right somewhat behind.

On cross-examination he testified that he did not

...this report is from the above mentioned judge
...has been filed for the people.

The report shows that before the commission
of witnesses, however, for the defendant want to bring
the testimony, and that the motion was overruled.

The witness was called on behalf of the people.

Richard A. Allen, and Daniel Graham, a policeman. When
testified that he got on a street car about 10:30 a.m., and
was standing on the inside of the car near the door, when
he felt someone reach into his left-hand hip pocket, and
he put his hand into his pocket and found his pocketbook
was gone; that he then saw two persons, one of whom he
knew, and a policeman standing next to the defendant, and
he, the witness, said, "I saw my pocketbook," that then
the policeman searched the defendant and recovered his pocket-
book, but did not find the pocketbook on him; that then the
policeman called Graham back to him by the name of Graham,
and Graham said, "I did not find the witness's pocket-
book or bag; that we then looked around and my pocketbook
was found on the floor where it was (referring to William
Allen) and was returned," that he, the witness, then
said and believed that the pocketbook which was not found
on the floor was his; that although he did not see the
man, the witness testified that he did not see the man
take the pocketbook, but that he saw the man take the
pocketbook from the witness's pocket, and
testified that he saw the witness's pocketbook.

see either the defendant or Blackwell take his pocketbook, and that he could not state that the defendant put his hand in his, the witness's pocket at any time on the car; that he could not say that the defendant had his pocketbook at any time, nor whether the defendant assisted anyone to take his pocketbook; that he did not know who got it out of his pocket.

The police officer testified that while on a State street car, going south somewhere between 43rd and 51st streets, he heard Ullen cry out, "Who got my pocketbook?" that he, the witness then grabbed the defendant, who was standing next to Ullen, and searched him, but found no pocketbook, and then he looked around and saw Blackwell standing on the other side of Ullen; that he then grabbed Blackwell and searched him, but did not find anything; that he then looked around and found the pocketbook on the floor where Blackwell had been standing; that Ullen then said that the pocketbook was his and that someone had taken it out of his pocket; that he, the witness, then arrested both Blackwell and Beckwith, and took them to the station. On cross-examination he testified that he did not see either the defendant or Blackwell with the pocketbook; that he did not see the defendant put his hand into Ullen's pocket; that he did not see him touch Ullen; that he did not notice any actions on the part of the defendant which would indicate that he was taking Ullen's pocketbook; that he did not notice anything until Ullen shouted out, "Who got my pocketbook?" that he could not say that either the defendant or Blackwell took the pocket-

book, but that the pocketbook was found where Blackwell had been standing.

The defendant testified that he was on the car which was crowded and was going to 74th and Cottage Grove avenue to get some Radio transformers; that he did not take Ellen's pocketbook; that when Ellen said something about his pocketbook, the police officer grabbed him, the defendant, and searched him all over, and then grabbed Blackwell and searched him; that after the officer said that he did not find anything, someone in the car said, "There it is on the floor;" that the officer took the pocketbook, but he, the defendant, did not see where he got it from; that the officer then took him and Blackwell over to the station; that he did not at any time put his hand into the pocket of the complaining witness, nor take the pocketbook of the complaining witness; that he never saw the pocketbook until the officer had it in his hands.

It will be seen from the foregoing that the evidence completely fails to prove that the defendant was guilty of larceny. The police officer may have been justified in suspecting that the defendant or Blackwell took the pocketbook from the complaining witness's pocket; but that is not enough. After reading the evidence it shows that there is an entire failure of such proof as would be reasonably necessary to convict the defendant of larceny. Further, there is no evidence whatever tending to show in any way what, if any, money was stolen. The only reference is to the pocket-

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book. That is insufficient. The law requires that all the essential facts constituting the crime charged shall be proved beyond a reasonable doubt. People v. Mooney, 303 Ill. 459. In the latter case the court said,

"It is a fundamental requirement that the accused be proven guilty of the crime charged in the indictment beyond a reasonable doubt. It is difficult to conceive of this being done without the jury being satisfied on the proof of all the facts necessary to constitute the crime beyond a reasonable doubt. While it has been said that it is not necessary to prove beyond a reasonable doubt every link in the chain of circumstances surrounding the commission of the crime charged, it has never been held to be the rule that the State need not prove the essential elements of the crime or the facts necessary to constitute the crime beyond a reasonable doubt. If one fact necessary to constitute the crime is not proven as required by law, then the crime itself is not proven as the law requires."

And, further, the venue as laid in the information was not in any way shown. That is, also, fatal. People v. Kululis, 296 Ill. 523. Rice v. People, 39 Ill. 435. People v. O'Gara, 271 Ill. 133.

The judgment, therefore, will be reversed.

REVERSED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

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ELIZA DONDANVILLE,

Appellant,

v.

JOHN A. CRAWFORD,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 616³

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Eliza Dondanville, brought suit in the Municipal Court against the defendant John A. Crawford, on a \$5,000.00 promissory note. The defendant, although he admitted it was executed by him, pleaded and undertook to prove that it was without consideration. There was a trial before the court, with a jury and a verdict and judgment that the plaintiff take nothing by her suit. This appeal is therefrom.

The defendant in his affidavit of merits sets up that at the suggestion of one Williams, and Susan Atkinson, he agreed to purchase from the plaintiff a 120 acre farm, subject to an encumbrance of \$7800.00; that in consideration of the title being conveyed to him, he executed the \$5,000.00 note sued upon; that he never received the title to the farm and received no consideration for the note; that the title to the farm is now in one Williams, who is the agent in Chicago for the plaintiff, who is the payee of the note sued upon.

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Opinion filed June 17, 1982.

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At the trial the plaintiff offered the note in evidence, and rested. The note bore certain endorsements, and its execution and delivery were admitted. The defendant called a number of witnesses and undertook to show that although the \$5,000.00 note sued upon was signed and delivered by him, the property, 120 acres of land in Kankakee County, Illinois, was deeded to one Williams, and not to him, the defendant, and that therefore, he got no consideration for the note. The evidence shows that there were, prior to April 24, 1922, the date the note was given, some negotiations between the plaintiff and the defendant in regard to the purchase by the defendant and the sale by the plaintiff of the 120 acres of land. There was offered in evidence, a letter, dated March 17, 1922, from the defendant to the plaintiff which states that the plaintiff and her husband had agreed to sell him the property, for which in part payment he had agreed to give his note for \$5,000.00; that if the plaintiff and one Bernard did not send him the deed before a certain time, the deal would be off, that he had already resold the property to one Williams; that he had already signed the note and had it ready to turn over. In that letter he used the language, "I am losing all kinds of money and I consider myself lucky by getting a purchaser for the land at \$100 an acre." The evidence shows that on April 24, 1922, in the office of Williams at 605 Portland Block, Chicago, there was a meeting at which a deed to the property was made out and delivered, and the note given. The defendant testified that a deed was then and there made, but not to him. When asked if he said to make the deed out to Williams, he

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first answered that it was made out in blank, and then answered the question in the negative. On the other hand, the evidence of Susan Atkinson, Williams, and the plaintiff, all goes to show that the defendant, for some reason of his own, had the deed made out and delivered to Williams for his - the defendant's - own benefit, and that it was, therefore, a proper consideration for the note which he gave contemporaneously with the delivery of the deed.

Their evidence shows that they all met at Williams' office on April 24, 1922. Susan Atkinson testified that on that occasion she received directions from the defendant how to make out the deed in question; that he gave her an old deed from which to make it, and asked her to prepare the deed for him in the name of Fred J. Williams "that Mr. Williams was taking title because he didn't care to hold title in Kankakee County himself; that Mr. Williams was going to hold title for him"; that Mr. Williams is still holding the title for him; that at the time of the transaction in question they all met there by appointment; that one Judy was present and told Crawford that he was dismissing a suit that was pending in Kankakee County; that he was extending the maturity of a mortgage for three years, and that the plaintiff and her husband were taking care of the past due interest; that the defendant said he would see that the interest was paid promptly; that he would take care of it; that she wrote the letter of March 17, 1922, at the defendant's direction, and that it was signed by him.

The witness Williams testified that the note was given and the deal closed in his office; that there were present Judy, Bernard, the plaintiff, Mrs. Atkinson, the defendant and himself, Williams; that at that meeting at the time of the execution of the note, a conveyance of real estate was made by the plaintiff and her husband and Bernard through him, the witness; that that was done under the direction of the defendant; that he, the witness, is still holding title to the property; that he is holding it for the defendant; that that was the arrangement when he first took title; that at that meeting there was a discussion in regard to the kind of note that should be executed; that Judy, who intended taking the note as security from the Bondanvilles, wanted a judgment note; that he, the witness, refused to let the defendant sign a judgment note, and, accordingly, the defendant gave a plain note, the note in question; that there was an extension agreement signed up on the mortgage; that he, the witness, would not take the title to the land and assume and agree to pay the encumbrance, but would only take it subject to the encumbrance; that the parties were there practically all day together; that there was a foreclosure proceeding pending, and Judy agreed to extend the time for three years; that Judy understood that he, the witness, owned the land; that the defendant "had reasons to hide that for some reason from him, and he (Judy) thought that I owned the land, and thought so until the first interest payment was due, and I, of course, told him that the land wasn't mine and that it was Mr. Crawford's." On cross-

examination he testified that the land still stands in his name, but that he does not own it.

The plaintiff, Eliza Bondanville, testified that at the time of the meeting in question, the title stood in her name and that of her cousin Bernard; that the defendant at that meeting said "he would give us a note for our consideration of the land of \$5,000, which was to be paid the following year, and that the farm was to be deeded to F. J. Williams;" and that, accordingly, was done; that the defendant said that he had sold it to Williams; that the conveyance of the property was made in consideration of the note in question; that she and her cousin, Bernard, parted with all their interest in the land, and the note was delivered. On cross-examination she testified that the defendant, in addition, cancelled a few hundred dollars indebtedness; that she did not know the exact amount.

It will be seen, therefore, that the evidence quite overwhelmingly demonstrates that the deed in question, at the instigation of the defendant, and for his benefit, was made to Williams, and that in consideration thereof he, the defendant, gave the note in question. The testimony of the three witnesses, plaintiff, Atkinson and Williams, is all consistent, and, also, consistent with the written statement of the defendant himself in his letter of March 17, 1922, in which he states that, at that time, he had sold the land to F. J. Williams. It is difficult to understand the testimony of the defendant, in view of the evidence of the witnesses just referred to, and his own letter. Susan Atkinson testified positively that she prepared the deed in question under

and the company's stock price fell to a low of \$1.50 in 1997.

The following is a list of the names of the persons who were present at the meeting held at the residence of the late Mr. J. H. [Name] on the 10th day of [Month] 19[Year]. The names are as follows: [List of names]

[illegible]

the directions of the defendant himself, and that he gave her an old deed as a form, and that he asked her to prepare the deed in the name of Williams, and that he gave as his reason for taking the title in the name of Williams that he did not care to hold title to property in Kankakee County, and that Williams was going to hold the title for him. Williams not only corroborated in full the substance of Susan Atkinson's testimony, but, also, stated that he holds title for Crawford under the original arrangement, and he goes further, and gives certain details with regard to the discussion of the judgment note instead of a plain note, and certain matters in regard to an extension for three years of a certain encumbrance. Williams testimony also shows that a certain indebtedness of the plaintiff and her husband of about \$1480, was cancelled by Crawford. From the evidence, it would seem that that was given as additional consideration for the equity in the farm. As we said above, the evidence overwhelmingly shows that the deed was made out to Williams at the defendant's direction; and the only inference therefrom is that there was ample consideration for the note.

The judgment, therefore, will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'CONNOR, J. P. AND THOMPSON, J. CONCUR.

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E. SUMNER WALKER,

Defendant in Error.

238 I.A. 616

v.

LEO J. DYER,

Plaintiff in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On September 9, 1921, the plaintiff, E. Sumner Walker, began suit in the Superior Court against the defendant, Leo J. Dyer, for compensation for services alleged to have been rendered the defendant in procuring a purchaser for certain real estate. There was a trial, with a jury, and a verdict and judgment for the plaintiff against the defendant in the sum of \$1,798.68. By writ of error, the defendant here seeks to reverse that judgment.

When the cause went to trial, the pleadings consisted, on the part of the plaintiff, of the original declaration, containing one special count, common counts and six counts which were in the form of an amended declaration.

In the first count it is alleged that the defendant, by an oral agreement, employed the plaintiff to assist him as a real estate broker, to find a purchaser for certain real estate; that the defendant promised to pay him, the plaintiff, the usual fee of 3%, and pursuant to that oral

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agreement, the plaintiff procured a purchaser, and on March 22, 1921, the purchaser procured through the plaintiff, bought the property for \$53,000; that the usual and customary commission on such a sale was 3%, or \$1,590.00, "and defendant undertook and promised to pay the plaintiff the usual and regular 3% commission."

In the second count it is alleged that the plaintiff performed his part of the agreement; that there was a custom among real estate brokers in Chicago to divide equally the commissions received when they worked together; that the plaintiff procured a purchaser for the property at a price of \$53,000; that the defendant at the time had the property for sale at \$45,000 net to the owner; that the defendant made a net profit to himself of \$8,000; that in accordance with the custom, the defendant, therefore, became liable to pay the plaintiff one-half of that sum, or \$4,000.

In the third count it is alleged that an agreement was made on March 9, 1921, by which the defendant employed the plaintiff to assist him in finding a purchaser for \$53,000, and agreed to pay therefor the sum of \$1,590.00; that the plaintiff performed his agreement and was entitled to \$1,590.00.

In the fourth count it is alleged that an agreement was made on March 9, 1921; that the defendant, by an oral agreement, employed him, the plaintiff, to assist the defendant in finding a purchaser for the price of \$53,000; that the

defendant procured such a purchaser, and the defendant agreed to pay the plaintiff 3% of the sale price; that the premises were sold to the person procured by the plaintiff, and the defendant became liable to pay the plaintiff 3% of the contract price.

In the fifth count it is alleged that the defendant represented that he was the agent for the sale of certain premises, and orally requested him, the plaintiff, to assist him to find a purchaser therefor, and "promised to pay to the plaintiff so much money as he reasonably deserved to have for his services in procuring such a purchaser;" that the plaintiff "reasonably deserved to have therefor the sum of \$1,590.00 upon the rendition of said services;" that the plaintiff entered upon said employment and produced a purchaser, and that the premises were subsequently sold, and as a result, the defendant became indebted to the plaintiff in the sum of \$1,590.00 for procuring such a purchaser.

In the sixth count it is alleged that the defendant orally requested the plaintiff to find a purchaser, and promised to pay the plaintiff at the customary rate 3% on the price for which the property was sold; that he, the plaintiff, procured a purchaser at a price of \$53,000, and was entitled to 3% on that price.

In the seventh count it is alleged that the defendant orally employed the plaintiff to procure a purchaser, and promised to pay him "at the rate of commission

which it was then and there the custom, and the plaintiff further avers that it was then and there, and had been for a long time prior thereto, the general and reasonable custom and usage of the trade amongst real estate brokers * * * to divide equally the commission received, as and when two brokers worked together, or where one assisted another in securing a purchaser, or seller of property; that the usual and customary rate was 3% on the sale price at which said property was sold, or bargained to be sold, which custom and rate were well known to the said defendant; that it was the usual custom to divide the said three per cent (3%) equally, of which defendant had notice, and the plaintiff avers that thereafter on, to-wit, the date last aforesaid, he entered upon said employment and undertook with the knowledge and acquiescence of the said defendant and procured a purchaser; that the premises were sold to that purchaser for \$53,000; that he, the plaintiff, has performed all the duties required of him to be performed, according to the oral agreement "by means whereof the said defendant became liable to pay the plaintiff a sum of one-half of three per cent (3%) on the sale price at which said property aforesaid was sold, or bargained to be sold, or the sum of Seven Hundred and Ninety Five Dollars (\$795.00) for procuring such a purchaser as above set forth."

A general and special demurrer was filed to the second count, being the first additional count of the declaration. Pleas of the general issue were filed to the 2nd, 3rd, 4th, 5th and 6th additional counts.

The demurrer to the first additional count was

sustained, and leave given to the plaintiff to file a second amended count. An amended second count was filed May 7, 1923. In that count it is alleged that the defendant employed the plaintiff to procure a purchaser for the property at a price of \$53,000; that there was a custom among real estate brokers "to divide equally the commissions, profits, or earnings received, as and when two brokers were interested together, or worked together, or where one assisted another in securing a purchaser, or seller of property;" that the employment was made in reference to that custom; that he, the plaintiff, procured a purchaser, and the premises were sold to that purchaser for \$53,000; that the defendant had the premises for sale at a net figure to the owner of \$45,000; that by reason of the plaintiff securing a purchaser at a price of \$53,000, "the defendant did then and there make and have a net profit, commission, or earnings to himself of to-wit, Eight Thousand Dollars (\$8,000), by means whereof, and in accordance with the custom, usage and rates of the trade * * * defendant then and there became and was liable to the plaintiff in a sum equal to one-half the amount so earned" upon the sale, that is, one half of \$8,000, or \$4,000 for procuring such a purchaser.

To that count, the defendant filed a plea of the general issue.

As the plaintiff and the defendant were real estate agents, and the plaintiff procured a purchaser for a piece of property represented by the defendant as a real estate agent, these questions, upon the pleadings, arise: (1) Whether the defendant expressly promised to pay the plaintiff 3% of

The first of these is the fact that the
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 the necessary funds to carry out its
 policy of non-interference in the
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It is the duty of the Government to protect the rights of its citizens and to maintain the peace and order of the country. The Government is committed to the principles of justice, equality, and freedom for all.

\$53,000; (2) whether the plaintiff was entitled to 3% as a customary charge for his services; (3) whether the plaintiff was entitled to half the sum that the defendant may have made out of the property over and above \$45,000; or (4) whether the plaintiff was entitled to split a commission of 3% on the amount of the sale, as the result of the custom to divide the commission where two different real estate agents work together and make a sale.

In answering these questions, all the pertinent evidence in regard to what was said when the plaintiff was employed or went to work to get a purchaser, is contained of Walker, the plaintiff, on the one hand, and the testimony in the testimony of Dwyer, the defendant, and his son, on the other hand. That the plaintiff obtained one Cooper as a purchaser for \$53,000, and the property was sold to the latter, is admitted; also, that the defendant Dwyer was the exclusive agent of the owner.

The evidence of the plaintiff, Walker, is to the effect that he lives in Evanston, and has been in the real estate business for eighteen years; that in the latter part of February, 1921, he called up the defendant, Dwyer, and asked him if the house in question was still for sale; that Fleig, the owner, had told him, the witness, that Dwyer had an option on it, and he had to deal with him exclusively; that Dwyer said, "It is still for sale; that there were several deals pending, and if I could sell it for \$53,000, why, shoot;" that a few days later, Mrs. Cooper - plaintiff's prospective purchaser - called on Dwyer to arrange an appointment to see how things stood; that on that occasion Dwyer said to him, the

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witness, "You have to hurry, I have sold the house practically and will meet the man at 11 o'clock tomorrow morning to close the deal;" and immediately he, the witness, said, "Well, is it worth while to go ahead? Can I deliver it?" and Dwyer said, "Yes, if your man can pay \$53,000 we can do business, but he will have to act speedily, and it will have to be by noon or 10 o'clock tomorrow morning;" that he, the witness, said, "Well, if I can get you that price for it, you will pay me the regular real estate board's commission, 3%?" that the defendant answered, "Yes, shoot."

The evidence shows that the next morning, the plaintiff, the defendant; Fleig; the owner, and Mrs. Cooper, who subsequently bought the property, went to the premises in question, and after Mr. and Mrs. Cooper had looked it over and conferred together, they decided to purchase the property, and Mr. Cooper, the plaintiff and the defendant then went over to the plaintiff's office to draft the contract; that a contract was then drawn up and Cooper gave a check for \$2500 on the purchase price, which was fixed at \$53,000.

The plaintiff further testified, that on March 13, 1931, he called at the defendant's office and told him that he understood that the deal had been closed for several days. He related what was then said as follows: "I haven't heard anything from you. He said, 'Oh, yes.' I said that I would like to get my commission. He said, 'Oh, yes.' He told me that he had said he would give me one-half of anything in excess of \$52,000 if I sold it for more than that. He said,

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'I will give you \$500'; that he offered him \$500; that he refused the \$500 because it was not the amount that they had agreed upon; that later, the defendant invited him over to take the matter up; that he did so, but they got nowhere in making a settlement; that at different times, either through one of his associates or by himself, an attempt was made to arbitrate it through the Chicago Real Estate Board.

In the course of the plaintiff's examination, he was asked by his counsel what was the usual and customary fee for such services in Chicago, and he answered, 3% on the sale price. That was objected to, and the objection sustained, on the ground that the question of custom was not involved; that the case the plaintiff was undertaking to make out was on an express promise to pay 3%. On re-direct examination, counsel for the plaintiff^{asked the plaintiff}/if he knew how much the defendant made on the deal. On the ground that the plaintiff undertook to prove an express contract, and that the evidence sought would be incompetent, counsel for the defendant objected; then, apparently, the question was withdrawn. Counsel for the plaintiff then made an effort to show that it was the custom to apply the rule of 3% where one broker assists another and the latter has it on a basis other than the usual fee, that is, the net price to the seller. The trial judge refused that evidence, on the ground that the plaintiff had testified as to what the contract was that was made, and as to what the commission should be.

The owner of the property, one Fleig, was put on the stand for the plaintiff, and was asked how much money

It will be seen from the foregoing that in the case of the defendant, the evidence is not sufficient to establish that he was guilty of the crime charged. The evidence is not sufficient to establish that he was guilty of the crime charged. The evidence is not sufficient to establish that he was guilty of the crime charged.

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he got for the property. That was objected to by counsel for the defendant, on the ground that it was immaterial. Then as it was admitted by counsel for the defendant that the property was actually sold for \$53,000, the court sustained the objection, on the ground that the question was immaterial.

The testimony for the defendant is to the effect that he was in the real estate business, and on March 9, 1931, had a conversation over the telephone with the plaintiff that the plaintiff wanted to know if he, the defendant, had sold the property; that he told the plaintiff that he was about to go down and close the deal; that he had an appointment at 10:30; that the plaintiff asked him if he would not give him an opportunity to make the sale; that he told the plaintiff he did not think it would be any use for him to try, because he had got the owner a fair price for the property, that is, \$52,000; that the plaintiff asked him to give him a chance to make some money; that he, the witness, said, "Well, if you can do it within a half hour, or an hour at the outside, so I can keep my appointment with the other man in event your man don't want to pay more money, go ahead;" that the plaintiff wanted to know "if there would be a regular commission in it;" that he, the witness, told him, no, that "if a price better than \$52,000 was had for the property I would do the very best I could for him;" that the plaintiff then said, "All right, I will leave the matter to you, Dyer."

On cross-examination, counsel for the plaintiff asked the defendant, "Would you mind telling us how much you made on this deal?" That was objected to and the objection

sustained. He was then asked, "You made more than 3%, did you not?" That, also, was objected to and sustained. Both objections were sustained on the ground that what the defendant's relations were with others had nothing to do with the present transaction.

The defendant's son, Leo F. Dwyer, testified that he was at his father's office the morning that the plaintiff went to look at the property on Sheridan Road; that he heard the plaintiff ask his father if he could have a half hour or an hour more on the deal; that his father said he did not think so, as he had to get down town to close the matter up. That witness, when asked what was said by his father about commissions, answered, "About commissions, he said, 'I won't pay the full commission on that building.'" And when asked, "What did your father say he would do?" the witness answered, "He said he would do the best he could on it, make some arrangement on it." That witness was asked, also, by counsel for the plaintiff, if he knew how much his father made on the property, and to that question objection was made and sustained. The witness further testified that nothing was said about 3%.

It will be seen from the foregoing that the evidence for the plaintiff tended to prove an express promise on the part of the defendant to pay the plaintiff a commission of 3% on \$53,000, and that the evidence on the part of the defendant tended to prove that he promised to do the best he could for the plaintiff. Now these latter words should be interpreted, it is not for us here to say. There being, therefore, a direct conflict in the testimony, it was very necessary

that the trial should be conducted with care, and that in addressing the jury at the close of all the evidence, nothing of importance should be stated that might in any way tend to mislead them, or put into their minds matters which might have influence, and yet were not properly a part of the case. Where the testimony is flatly contradictory, as here, and it becomes almost solely a question of credibility, it is particularly necessary that the case should be tried without assertions by counsel that are not justified by the evidence.

In the course of the trial, counsel for the plaintiff endeavored to show what actual amount of profit the defendant made out of the transaction. The trial judge ruled, and, in view of the evidence which the plaintiff introduced, quite properly, that that was incompetent, but in the course of the argument for the plaintiff at the close of the evidence, his counsel several times, quite bluntly, seemingly undertook to inspire in the minds of the jury the notion that the defendant ought to pay because he made considerable out of the deal. That argument, even by innuendo, was not based on the evidence in the case. It may have had some or no influence upon the determination of the jury. We do not know. But as the only question was, whether the plaintiff, on the one hand, or the defendant and his son, on the other, should have been believed, that is, whether the plaintiff had proved by a preponderance of the evidence that the defendant expressly promised to pay a 3% commission on \$83,000, or promised to do the best he could, the argument, of counsel for the plaintiff, by innuendo at least, intimating that the defendant had made a large sum of money out of the transaction, may have in-

clined the jury to take what might be called a popular or practical view of the matter, instead of a just one, based on the evidence, and so conclude that - their only reasonable doubt being on the matter of credibility - it would be fair, if the defendant got a large profit, ^{to} decide the case in favor of the plaintiff.

Another reason why the matter should be carefully presented to the jury lies in the fact that the plaintiff himself, considering his pleadings, by which he sets up at least three different inconsistent causes of action, evidently was in doubt, at least his counsel was, whether he was going to undertake to prove an express promise to pay 3%, or an implied promise to pay the customary 3%, or an implied promise to pay one-half of the customary 3%, or an implied promise to pay, according to custom, one half of the net profit made by the defendant.

Considering the inconsistency of the various causes of action stated in plaintiff's pleadings, and the fact that the plaintiff's case rested upon his own testimony; that that testimony was contradicted by the defendant and his son, and that counsel for the plaintiff, in their argument at the close of the evidence, emphasized a matter that was not justified by the evidence, we feel, in the interest of more exact justice, that the case should be retried. Mattice v. Klawans, 312 Ill. 310; Vale v. Chicago Junction Ry. Co., 359 Ill. 479; Herrick v. S.A.E.L.R.R. Co., 357 Ill. 370; Marshall v. Davis, 127 Ill. App. 159; West Chicago Street R.R. Co. v. Annis, 185 Ill. 478.

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We have carefully examined the record in this case, and are of the opinion that the judgment must be reversed.

REVERSED AND REMANDED FOR A NEW TRIAL.

O'CONNOR, P.J. CONCURS;
THOMSON, J. DISSENTING:

I am unable to concur in the foregoing decision. On several occasions during the trial the plaintiff endeavored to show how much the defendant had received on the sale of this property and whether or not it was the fact that the defendant had an option on the property, at a given price, and on the sale of the property to the purchaser produced by the plaintiff, the defendant had really acted as principal and made a profit, represented by the difference between the price paid by the plaintiff's purchaser and the option price at which the defendant held it. All attempts to show this were prevented by objections interposed by the defendant, which were sustained by the trial court. In my opinion, the facts thus sought to be shown were both competent and material. That defendant's counsel himself now considers them so, is shown by his own argument as set forth in the brief filed in this court, where he contends that the plaintiff's claim "that defendant agreed to pay him the whole commission of 3 per cent on \$53,000, the real estate board rate in such cases, and himself (the defendant) to have nothing," is unreasonable. That is the very subject-matter on which he, himself, successfully blocked all inquiry. In my opinion, it would be decidedly material in determining which

of these parties is correct, to find out what the defendant's commission on this transaction amounted to, if it was a commission; or if he made a profit, how much that amounted to. If it was a commission of 3 per cent merely, as defendant's counsel now intimates in his brief, it would tend very strongly to support the position taken by the defendant in his testimony. If that was the true situation, it is rather difficult to understand why such strenuous objections were made to showing it. If, on the other hand, the defendant made a profit on this deal, which was greater than 3 per cent on the purchase price, it would tend just as strongly to support the plaintiff's theory, as evidenced by his testimony. Those being the circumstances, I am of the opinion that the defendant is not in a position to object to the remarks of counsel for the plaintiff in the course of his argument to the jury, when he asked the jury if they supposed the defendant only made 3 per cent on this deal, and further, why they supposed he was so afraid to let them know how much he did make on the deal.

As to the further objection raised by defendant to other remarks of counsel for the plaintiff, in which he intimated that he was very strongly of the opinion that somebody in the case had not told the truth, I am unable to see that those remarks are beyond the realm of legitimate argument. The testimony of the respective parties was in direct conflict. One or the other of them was certainly not telling the truth, there being no room for differences of judgment or opinion, and it was up to the jury to determine who was telling the truth and who was not.

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TANNER HOME COAL CO., a corp.,
Appellee,

v.

HAROLD J. FINDER, JOHN B. MILLER
AND LOUIS POLAKOW

HAROLD J. FINDER,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

238 I.A. 616⁵

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

The plaintiff, Tanner Home Coal Co., brought suit in the Municipal Court against the defendants, Harold J. Finder, John B. Miller, and Louis Polakow, to recover the sum of \$318.40 for coal alleged to have been sold and delivered to the defendants on November 22, 1921. There was a trial before the court, without a jury, and a judgment against all the defendants and in favor of the plaintiff for the full amount. This is an appeal by Harold J. Finder from that judgment.

There is no question but that the coal was ordered, and was then furnished to a certain building by the plaintiff, but the defendant Finder claims that he had nothing to do with it and that he is in no way responsible for the purchase of the coal. According to the testimony of the defendant Polakow, one Faber, in August 1921, called on him and Miller, Secretary of the Fidelity Bond and Mortgage Co. and informed them that he was anxious to dispose of certain real estate - the property to which the coal was subsequently delivered -

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WATER RIGHTS
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WATER RIGHTS
DIVISION
WASHINGTON, D. C.

2331 A. 316

Opinion filed June 17, 1935.

THE UNITED STATES OF AMERICA

vs.

THE DISTRICT OF COLUMBIA

IN THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

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that an offer was made, and the following Sunday a contract was drawn up in which Miller was the ostensible purchaser; and that Finder was informed of the contract a few days later. Polakow further testified that later, in the early part of September, 1931, he and one Cohn, went to Finder's office, and there the matter was talked over, and a contract was entered into whereby the contract between Faber and Miller was assigned to Finder. That contract, though introduced in evidence, does not appear to be in the record.

There was then made - no date appears upon the instrument - a writing which provided in what way Finder, Polakow, Cohn and Miller should share in the profits, if any, that might be derived from a subsequent sale of the real estate which had been bought in the name of Miller from Faber. It was signed, "John B. Miller, By His Authorized Agent, Louis M. Polakow." It contained the following:

"In consideration of the sum of Two Thousand Dollars (\$2,000) this day loaned by Harold J. Finder to Louis M. Polakow, for a period of not exceeding sixty days, the said John B. Miller, agrees to subject the said real estate for sale or exchange as the said Harold J. Finder may hereafter agree upon, and upon such terms as he may agree upon, provided, however, that the said John B. Miller shall receive a net profit of Five Thousand Dollars (\$5,000) in the disposition of said real estate, which he now holds under contract from Joseph F. Faber.

"In the event said real estate is sold or exchanged and there is a profit in excess of Five Thousand Dollars (\$5,000) then the said Louis M. Polakow shall receive one-

third of said profit, but not less than \$5,000 and the remaining two-thirds shall be divided between the said Harold J. Finder and one Henry Cohn, the said Finder to receive sixty per cent of said remainder and the said Henry Cohn forty per cent.

"The said John B. Miller reserves the right to make a sale of said property without the assent of said Harold J. Finder, providing there is a net profit of at least Seventy-five Hundred Dollars (\$7,500).

"The said John B. Miller is hereby given the right to hold such earnest money as may be deposited by any future purchaser of said property provided that the sum he shall hold shall not exceed Three Thousand Dollars (\$3,000). The remainder shall remain with Harold J. Finder.

"John B. Miller hereby authorizes Harold J. Finder to make an assignment of the contract referred to in here to himself or such other person as he may desire."

Certain negotiations were subsequently had concerning the property, so that on October 19, 1921, one Solomon, - a personal friend of Polakow - and his wife conveyed the property in question by warranty deed to Harold J. Finder. That deed was recorded in the Recorder's office on October 28, 1921, and re-recorded on December 14, 1921. Finder says he bought the property on September 14, 1921. The coal in question was delivered to the premises on November 22, 1921. On December 23, 1921, Finder sold the property to one Mrs. Seaman. Just what profit was made by the transaction, is

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is not accurately shown. There were several mortgages on it, and the sale price was \$190,000.

There is some evidence in regard to a corporation called the Fidelity Bond and Mortgage Company. Just what the condition of the company was in 1931, is not definitely shown. The evidence does show, however, that sometime in August, 1931, - according to Polakow - Finder was President, Polakow, Treasurer, and Miller, Secretary, and some of the evidence introduced would seem to suggest that the contract between Miller and Faber was made really for the benefit of the corporation, but with the record in the condition it is, we are compelled to conclude that all that was done in regard to the purchase of this property in the name of Miller and Faber, and the sale ultimately to Mrs. Seaman, became a joint venture of Finder, Polakow, Cohn and Miller. The above-mentioned document which was signed by Miller, by Polakow as his agent, clearly shows that each one of them, upon certain contingencies, was to receive some profit if ultimately a successful sale was made. All three of the defendants, therefore, were pecuniarily interested. Accordingly, it was a joint venture. Inasmuch as the coal was delivered, and was delivered to the premises before they were finally disposed of by Finder, and long after the contract was entered into between Faber and Miller, it makes no difference who personally gave the order. The fact that Polakow and Finder did not agree, as between themselves, which one was ultimately liable, is immaterial in determining the primary joint liability of Finder, Polakow and Miller to the plaintiff. It may be that upon an accounting between Polakow

and Finder, the former is liable to the latter, or vice versa, but there is no substantial evidence even tending to show that Finder, Polakow and Miller were not all liable jointly and severally to the plaintiff.

Finder claims that prior to September 14, 1931, he was in no way concerned with the collection of the rents, nor with the management of the building, but the evidence does not support that claim. On the other hand, there is evidence that Finder was interested in the property practically from the beginning. Gohn testified that a few days after making the contract between Faber and Miller, he told Finder that they had "made a good buy and he ought to get in that deal," and Finder himself admits that he was to get back not only the \$2,000, but also a portion of the profits in the deal; and that when the property was finally sold to Seaman, he got \$28,000 and gave none of it to Polakow or Miller.

It is impossible to reconcile the testimony of Finder and Polakow. With the record in the condition it is, we are not justified in overriding the judgment of the trial judge.

The judgment of the Municipal Court will, therefore, be affirmed,

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

88 - 29497

OTTO A. SENDLINGER,

Appellee,

v.

SIMON RUBINSTEIN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 617

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff Sendlinger, brought suit in a fourth class case in the Municipal Court for the value of a warehouse certificate representing a barrel of whiskey, and obtained a judgment in the sum of \$200.00. This is an appeal therefrom.

The plaintiff's statement of claim recites that about December 27, 1920, he gave to the defendant a warehouse certificate - for which he had paid about \$218.00 - for a barrel of Cove Springs Whiskey that was in storage in a warehouse in Chicago; that the defendant represented to the plaintiff that he - the plaintiff - could withdraw the barrel of Cove Springs Whiskey for his personal use, and that in case it was impossible for the plaintiff to make use of the barrel of Cove Springs Whiskey within one year from that date, the defendant in writing agreed to buy it back from the plaintiff at the price which the plaintiff had paid for it; that the plaintiff found he could not

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386 I.A. 617

Opinion filed June 17, 1935

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withdraw the whiskey for his personal use, and that it became impossible for him to make use of it within one year; that thereupon he demanded from the defendant "before and at the expiration of the year," the price which he had paid the defendant, that is, \$218.00, but that the defendant refused to take back the certificate or to pay him its value, \$218.00.

The cause was tried before the court without a jury. Only two witnesses were called, being the plaintiff and the defendant.

The testimony of the plaintiff is that on December 27, 1920, he purchased from the defendant a warehouse receipt or certificate for a barrel of whiskey; that that purchase was made in accordance with the terms of a certain written document, which is as follows:

"I hereby agree to accept in trade 1 Bbl. Woolner & Co. Whiskey & deliver to Otto A. Sendlinger 1 Bbl. of Cove Spring Whiskey, Serial 135065 stored at the Waken & McLaughlin Warehouse. I also agree to buy the Whiskey back at the price paid in case it should be made impossible for said Otto A. Sendlinger to make use of the whiskey within one year from date."

That document was signed by the defendant Rheinstein. The evidence of the plaintiff is to the further effect that he tried to obtain a permit from the United States Government to remove the whiskey from the warehouse; that the defendant told him that he could obtain a permit if the whiskey were for personal use; that he, the witness, was unable to obtain a permit; that he advised the defendant on several occasions, both before and after December 27, 1921, that he

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The testimony of the witnesses in this case is as follows:

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could not get a permit or use the whiskey, and at the same time tendered the defendant the warehouse receipt and asked for the return of the \$212.00 which he had paid the defendant for the whiskey; that the defendant refused to return the purchase price which had been paid.

The testimony of the defendant Rheinstein is that the plaintiff Sandlinger did not within one year from December 27, 1930, the date of the contract, or at any other time before bringing suit, offer to him the return of the barrel of Dove Springs Whiskey, or tender that barrel to him on the return of the plaintiff by him, the defendant, of the consideration received therefor, or in any way demand his money back within the year.

The trial judge at the close of the evidence having entered judgment in favor of the plaintiff for \$200.00, it is now contended on this appeal that the plaintiff failed to establish his claim by a preponderance of the evidence, and a number of cases are cited, supposedly to the effect that where only one witness is called on each side and their testimony is in direct contradiction, the plaintiff fails to make out his case by a preponderance of the evidence. Counsel rely, in part, at least, upon Peaslee v. Glass, 61 Ill. 94, but in that case the court made a qualification, and said: "There are very few cases in which a jury should find a verdict for the plaintiff upon his unsupported testimony alone, when that testimony is positively contradicted by the defendant." This court said, in Hately v. Kiser, 183 Ill. App. 543, in discussing the Peaslee case, "We still hold, as Judge McAllister said in Herring

v. Poritz, 6 Ill. App. 208, 'It will not do to say as a matter of law that there can be no preponderance of the evidence in favor of the party holding the affirmative when there are but two (opposed) witnesses upon the facts in issue.'" First State Bank of Plano v. Isaacs, 221 App. 658. In the latter case this court said: "Even where the testimony of the plaintiff is without corroboration and that of the defendant is corroborated by other unimpeached witnesses, it does not necessarily follow that a verdict and judgment for the plaintiff will be set aside by a reviewing court as against the manifest weight of the evidence." Van Meter v. Lambert, 104 Ill. App. 243; West Chicago St. R. R. Co. v. Lissnerowitz, 197 Ill. 607; Hears, Roebuck & Co. v. Hears Slayton Lumber Co., 226 Ill. App. 287.

Of course, if we were to assume that the two witnesses were of equal credibility, it would follow that we would be logically compelled to hold that the plaintiff did not make out his case by a preponderance of the evidence. Where there is equality there cannot be a preponderance.

But the necessary inference, from the conclusion reached by the trial judge in this case in entering judgment for the plaintiff, is that the two witnesses were not of equal credibility; and making that assumption, as we do, it would not be reasonable for us, upon the record, as it appears here, to hold that the judgment is against the manifest weight of the evidence. The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

105 - 23514

JOHN J. HOBIN,

Appellant,

v.

WILLIS J. RAYBURN, MARCELLA
T. RAYBURN and PAUL WAHL,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 617²

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

The plaintiff, Hobin, an employee of the United States Government, which was the lessee of a certain building, having been injured by falling between two cog wheels of a pump in the basement of the premises, brought suit against the lessors, the owners, for damages. There was a trial before the court, with a jury, and at the close of the plaintiff's evidence, upon motion of the defendants, the jury was directed to find the defendants not guilty. A verdict was returned accordingly, and judgment then entered that the plaintiff have and recover nothing by his suit. This appeal is therefrom.

The cause was tried upon an amended declaration containing nine counts. The first count charges that the defendants, the owners of a certain five story and basement building, on August 1, 1921, leased it in writing to the United States Government as a postoffice annex; that the defendants covenanted to keep the premises in repair and to supply and provide water in said premises

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Opinion filed January 1935.

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report of the committee which was
appointed to investigate the
alleged activities of the
Soviet Government in the
United States. The committee
was organized by the Senate
and the House of Representatives
in 1935. The committee
was composed of members of
both houses of Congress and
of the public. The committee
was charged with the duty
of investigating the
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for the lessee; that they covenanted to keep the premises, including the heating and lighting fixtures and plumbing, in repair and condition to the satisfaction of the lessee; that at the time of making the lease, part of the premises consisted of a water pump driven by electrical power, certain parts of which consisted of unguarded gears and cog wheels, which made the pump, when in use, dangerous and unsafe, of which the defendant had knowledge or in the exercise of ordinary care ought to have had knowledge; that the lessee took possession of the premises under the lease and the defendants caused the city water supply to be shut off and it became necessary to use and operate the pump; that at the time of the leasing, the pump was out of repair, worn, defective and insecure; that the pins, connecting rods and babbitting were worn, defective and insecure, which the defendants knew; that on April 3, 1933, the plaintiff was at work, for the lessee, about the pump; that the defendants so neglected their duty to the plaintiff, in that they negligently and carelessly allowed and permitted the pump at the time of making the lease to be and remain so worn, unsafe, insecure and defective that as the plaintiff passed by the pump, it, on account of its condition, caused the ground and flooring near it to shake and vibrate with such force that the plaintiff as he passed it, slipped and fell upon the floor, the floor at that time being oiled and slippery; that as the result of falling he was thrown and fell against the pump and his left hand and arm was caught in the uncovered and unguarded gears and cog wheels and he was injured so that his arm and part of the

shoulder had to be amputated; that at the time in question he was in the exercise of ordinary care.

The second count adds that the vibration of the pump caused oil and greases to be thrown out on the floor so as to make it oily, slippery and unsafe to walk upon. The third and fourth counts are practically like the first save that they do not charge the want of guards. The fifth count adds to the first the want of guards and covering for the cog wheels and gears. The sixth count is based on the state statute as to the health and safety of those employed about dangerous machinery and guards. The seventh count is based on a city ordinance, but as the ordinance was not offered in evidence, that count is negligible. The eighth count is like the first, save it charges a failure to guard the cog wheels and gears. The ninth charges that the defendants permitted the pump for a long time prior to the date of the accident, to be unsafe and out of repair in violation of the provisions of the lease.

The ad damnum is \$60,000.00. The defendants pleaded the general issue; and, also, specially, denying possession and control of the premises.

The evidence introduced on behalf of the plaintiff is substantially as follows: The defendants were owners of the real estate known as numbers 720-722 W. Monroe Street, Chicago. On May 1, 1921, they leased it to the United States of America for postoffice headquarters, for a period of seven years and eight months thereafter, at an annual rental of \$25,000. The United States of America (hereinafter entitled the lessee) on August 1, 1921, entered into exclusive posses-

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There was also a large number of people who were not present at the meeting. The meeting was held in the afternoon and was attended by a large number of people. The meeting was held in the afternoon and was attended by a large number of people. The meeting was held in the afternoon and was attended by a large number of people.

ion of the premises. At the time the lessee entered into possession of the building there were two sources of water supply, one from an artesian well, about 700 feet deep, in the basement, and the other, city water obtained through the building next door.

The plaintiff Mobin, was employed by the lessee to tend the boilers in the basement and oil, operate and care for the electrically driven pump (on which he was injured), which was located in the basement. The lease contains the following: "Said building fitted and supplied by the said party of the first part (the lessors) with satisfactory heat and light, heating and lighting fixtures, the requisite water-closets, urinals, water, fire proof vault, * * * during and until the full end of the term, seven years and eight months. * * *

"The said party of the first part (the lessor) hereby covenants and agrees * * * to pay all taxes and assessments of whatever nature, including water rates, that may be levied or assessed upon said premises during the term aforesaid under this lease * * * and will at all times keep said premises, including the plumbing, heating and lighting fixtures vault in good repair and condition to the satisfaction of the party of the second part, and in default thereof, the said premises shall be deemed unfit * * * and no rent shall be due or payable * * * until the same shall be put in a satisfactory condition."

The lessee used the building principally for the storage of Government material. In the basement there were two boilers, which were used for heating and supplying the building with hot water, and there was, also, machinery there that was a part of and used in connection with the elevator. There was a pump room, about 14 X 14 feet, north of the base-

ment proper. The floor of the pump room was slightly lower than the level of the floor of the basement. The entrance to the pump room from the basement was towards the north. The pump room contained two pumps, one on which the plaintiff was injured, and another, a small one, which was not in operation at the time Robin worked there. There was a walk leading north from the door extended to the north building line. The small pump was on the west side of the walk, and the pump on which Robin was injured was on the east side of the walk. The walk extended not only from the entrance to the north, past the pump in question, which was at its right, but extended east about three feet, and then went south again on the east side of the pump. The pump, in question, was a five or six horse power motor pump, and was used for pumping water to the upper floors of the building, and for a hundred gallon water tank. The pump was operated by a motor, which was on the south end of the base of the pump and was run by a chain drive. On the right-hand side of the pump were two cog wheels, geared together; one six inches, and the other thirty-six inches in diameter. The latter had four inch cogs. The pump was operated by a rocker arm, and at the extreme north end of the arm there was a piston rod leading down into the pump, or well. When the pump was in motion, the arm and the piston would go down, and when they came up, water was brought up for use in the building. The width of the passage way east of the pump, in which the plaintiff was injured, was 22 to 24 inches.

The work of the plaintiff was to look after the pump, keep it clean and well oiled; to look after the pump

The first of the group was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The second was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The third was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The fourth was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The fifth was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The sixth was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The seventh was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The eighth was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The ninth was a small, dark, round object, about the size of a pea, and it was found in the center of the group. The tenth was a small, dark, round object, about the size of a pea, and it was found in the center of the group.

THE BUREAU OF THE CENSUS HAS BEEN ADVISED BY THE SECRETARY OF THE ARMY THAT THE FOLLOWING INFORMATION IS AVAILABLE:

so that it would not run hot at any time. In addition to that work, he was required to go into the basement and keep the hot water tank filled with hot water; that was done by keeping a small fire going under the boiler in the basement.

From the time the lessee went into possession of the premises on August 1, 1931, the pump was used practically every day. At no time were there any guards about the cog wheels or other parts of the pump. From the time the lessee went into possession up to the time of the accident, the pump and pump room were in a bad state of repair. The floor of the pump room being the space walked upon, was made of rough concrete. On the top of that, constructed by the plaintiff, there was put in, wooden slats, nailed together, all the way around, to help keep the feet from being in the water that was splashed out by the pump when in operation.

The testimony of a number of witnesses tends to show that the pump, from the time the lessee went into possession until the time of the accident, was in a very unsatisfactory condition; certain bearings being so worn and loose that oil dropped from them out onto the floor, the piston being too loose and worn, and there being too much vibration of the various parts of the machinery; the space around the pump in the pump room was very narrow, and to get to the switch to turn on the pump it was necessary to walk around three sides of the pump; the wooden slats around, and on the floor were always wet and greasy; the whole space was lighted only by one small dim electric light bulb; and the gears of the pump had no guards.

The plaintiff went to work in the pump room in January, 1922. About 8:30 on the morning of April 3, 1922, he went into the pump room to look over the motor and see what oil it needed. He then oiled both the pump and the motor, and then started the pump. He then went out of the pump room to do some work in the boiler room, and shortly afterwards, smelling something like burning grease, he returned and found the pump room full of smoke. After waiting a few minutes, he went in and stopped the pump. At that time he could see that smoke was coming out of the bearings on the right-hand side. He then went out and left the pump shut down for about twenty minutes. The Assistant Superintendent, Fleig, then came down into the basement, and they went in, and after he, the witness, oiled and greased it, they started the pump up again. They then went out of the pump room and were gone about ten or fifteen minutes. Then the plaintiff re-entered the pump room, walked directly north, then turned east, and then south to get on the right-hand side of the pump. He took a piece of waste from a box he had there, and proceeded to dry his hands. After drying his hands, he started back to go outside. At that time there was still some smoke in the top of the room. Just as he made the first step to start north his left foot "shot north-east" against his right foot, and threw him off his balance. He threw up his arms and grabbed for a pillar which was near, but missing it, his arm dropped down right into the cogs of the two cog wheels. The cog wheels dragged him in until he was pulled in up to the collar bone and his face rested on one of the cog wheels. Then the fuse blew in the motor box and the pump stopped. He was in there from fifteen to twenty minutes, conscious all the time, but unable to loosen him-

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, stuffy interior. I looked up at the sky, which was a pale, hazy blue. The sun was just rising, and its light was soft and diffused. I took a deep breath and felt a sense of peace. The world was quiet, and I was alone. I walked towards the horizon, feeling the ground beneath my feet. The air was so clean, and the light was so gentle. I felt like I was in a dream. I kept walking, and the world opened up before me. The horizon was just a line in the distance, and beyond it was nothing but sky. I felt a sense of freedom, and I knew that I was exactly where I needed to be.

self, when someone came from the next building, and he was taken out. Before he was taken out, he saw a very large amount, a large "gob of oil;" part of it he was lying in and the rest of it was back and on the south side of him. The oil referred to was on the east side of the larger cog wheel. Shortly after he was injured, Fleig, who went into the pump room, found one of the oil cups on the floor, with oil along side of it.

After the lessee had gone into possession, but before the accident, Fleig, the foreman, had told Wahl, one of the defendants, that in his judgment it was unsafe to run the pump without guards. Also, before the accident, Fleig, talked to Wahl about repairing the pump, and stated that at times the lessee could not get enough water, and suggested getting city water; but Wahl told him it would cost too much to put it in, and said to go ahead and use the pump.

The trial judge at the close of the plaintiff's evidence, having directed a verdict for the defendants, the question arises whether the evidence introduced so tended to prove a cause of action that it should have been submitted to the jury.

It is contended for the plaintiff (1) that a workman employed by a lessee may sue the lessor in tort to recover damages for injuries sustained as a result of the lessor's breach of covenant to repair and keep in good condition, "because when the lessor voluntarily makes such a covenant with the lessee, an implied legal duty arises as a result of such covenant between the lessor and the servant

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

2. Next, it's important to gather information and resources. This could include research, consulting experts, or identifying potential obstacles.

3. Once you have a clear understanding of the problem and the resources available, you can begin to develop a plan. This plan should outline the steps you will take to achieve your goal.

4. After developing a plan, it's time to implement it. This involves putting the plan into action and monitoring progress along the way.

5. Finally, once the goal has been achieved, it's important to evaluate the results. This allows you to see what worked well and what could be improved for future projects.

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or guest of the lessee, obligating the lessor to fulfill the contract entered into with the lessee; that when the lessor covenants to keep premises in repair he, by his own voluntary contract, elects not to surrender the duty of care and repair to the lessee and that by so contracting he is thereafter manifestly and logically liable for the breach of the duty he assumes, to the same extent as though no lease had been made; that such liability exists independent of and apart from the lease or contract of letting; (3) that the pump and pump room were in a dangerous, defective and unsafe condition at the time of the letting, and that that condition amounted to a nuisance; that under the law, a lessor is liable to an employee of a tenant who sustains injury as the result of a dangerous and defective condition upon the demised premises, which condition existed at the time of the letting, provided plaintiff was in the exercise of ordinary care at the time he was injured.

The trial judge put his decision on the ground that the plaintiff, a workman, for the lessee, could not maintain an action of tort against the lessor; that the cause of action which the plaintiff undertook to prove was based on the lessor's breach of covenant to repair, and, so, would not lie.

It has been announced in this State, and also in some other jurisdictions, that if the lessor has agreed to make repairs, he may be liable, as the result of that agreement to a third person, for injuries arising from a failure to make repairs, even though the necessity for such repairs does not arise until after the leasing; one of the theories

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DO hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of the Interior.

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being that thereby circuitry of action is avoided. It is stated in Tiffany, (Landlord and Tenant, Vol. 1, Sec. 107) that the liability of the landlord was suggested somewhat over a century ago in a case (Payne v. Rogers, 2 N. H. 350) in which it was decided that by reason of such an agreement on the part of the landlord, the tenant was not liable. One of the judges in that case said, "If we were to hold that the tenant was liable in this case, we should encourage circuitry of action, as the tenant would have his remedy over against the landlord."

We held in Reichenbacher v. Fahmeyer, 8 Ill. App. 317, that where an owner had leased a hotel to the employer of the plaintiff, and at the time there was a chandelier suspended from the ceiling of the barroom - which was constructed in so careless a way as to be dangerous and unsafe to use, and the defendant knew and the lessee did not of the defect - the plaintiff, who was injured by the falling of the chandelier, was entitled to recover from the lessor. In that case we said that a lessor is not responsible for injuries arising from a failure to keep the premises in good repair unless, first, he had by express agreement with the tenant, agreed to repair "so that in case of recovery against the tenant he would have his remedy over, and in that case to avoid circuitry of action the party injured may in the first instance, sue the landlord; or, second, unless the premises were let with a nuisance upon them by means of which the injury complained of is received." Citing Gridley v. City of Bloomington, 68 Ill. 47. Also, in the early case of Baird & Bradley v. Shipman, Admr., 33 Ill. App. 503, this court undertook to state how - where there is no direct

privity of contract between the injured party and the one sued - there might be a liability in tort. In that case certain real estate agents leased for their principal a barn, the main door of which turned out to be so insecure and dangerous that, while a third person was delivering a load of kindling, the door fell and killed him. The lease provided that the tenant should keep the premises in good repair. There was evidence that when the lease was made the door was in a very insecure condition, and that the defendants, the real estate agents of the owner, "verbally" agreed to put the premises in thorough repair, but did not do so. It was there stated that "It is not his contract with the principal which exposes him to, or protects him from, liability to third persons, but his common law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable." That, the court based on Belaney v. Hochereau, 34 La An. 1123, and Osborne v. Morgen, 13 Mass. 102. This court quotes from Whegan on Agency, Sec. 572, and approves the following: "It is not the not doing of that which is imposed upon the agent merely by virtue of his relations, but of that which is imposed upon him by law as a responsible individual in common with all other members of society." Citing Lottman v. Barnett, 62 Mo. 159; Martin v. Beroliat, 20 Ill. App. 263; Harriman v. Stowe, 57 Mo. 93; Hell v. Joselyn, 3 Gray 309; Campbell v. Portland Sugar Co., 62 Me. 552; and Wharton on Negligence, Sec. 535.

In Everett v. Foley, 133 Ill. App. 436, where the plaintiff was injured by a shutter falling from a building

of which the defendants were the lessors, the court said, "If the injury happened because of the dangerous condition existing at the time of the leasing, then it was the duty of appellants (lessors) to see that the dangerous condition was remedied. Appellants could not, by making a lease binding tenants to repair, avoid their own legal obligation. If a dangerous condition existed and by ordinary diligence appellants could have discovered and remedied the condition, then it was negligence on their part not to have done so. While it is a general rule that while the tenant or occupant of the premises is liable for injuries to third persons arising from neglect to repair, yet the exception is as well established as the rule itself, that where the premises are rented in a bad state of repair the landlord is liable for injuries caused thereby."

For the defendant, considerable emphasis is placed on the case of Gronwell v. Allen, 151 Ill. App. 404, but in that case the suit was brought by the tenant - who had been injured by falling through a platform at the rear of the building - against her landlord, and Mr. Justice Duncan then said, "The relation of landlord and tenant is entirely different from that of a stranger and an owner and an occupant of the premises." It is true, however, that in the Gronwell case the court cited Jones on Landlord and Tenant, and seemed to sanction the statement by that author that "The landlord's responsibility for damages caused by his failure to perform his contract to repair, rests altogether on his breach of contract." Considering the facts in the Gronwell case, it does not involve whatever rights a third person may have

against a lessor.

In Gochran v. Kankakee S. & L. Co., 179 Ill. App. 437, where a child fell into some water in a quarry and was drowned, the court held that both the owner and the lessee of the premises were liable in tort; that the owner was liable because it was provided in the lease that it would construct and maintain a woven wire fence around certain parts of the premises, which it failed to do. The court said, "This provision in the lease was recognition by both parties of the danger of the pond, and the fence that was there when this child was drowned was not a compliance with the lease. The law is that where premises are rented in a bad state of repair the landlord is liable for injuries caused thereby to third parties. * * * The joint liability of both defendants was therefore established by the evidence under the rules of law above stated."

The case of Thomas v. Yammool, 185 Ill. App. 414, was a suit by the plaintiff, a foot passenger, against a saloonkeeper, for injuries received by one of his feet going through a rusty iron door in the sidewalk. The saloonkeeper contended that his landlord was liable, but the court held that as there was no covenant on the part of the landlord to keep the premises in repair, and as it was the duty of the saloonkeeper to keep them in repair, the latter was liable for the consequences of his dereliction.

In Shields v. Hale, 186 Ill. App. 250, where it was shown that one Barrett, plaintiff's intestate, while in the employment of a tenant McSpadden, for whom he had worked on the

against a house.

In *Johnson v. Johnson*, 100 Ill. 411.

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premises for a number of months, went into a bin to shovel some corn, and while there the pressure from an adjoining bin broke a partition loose, injuring him and causing his death, the court held that there was no liability. In that case there was no contractual obligation on the part of the lessor to keep the premises in good repair, but, on the other hand, there was an express provision that the tenant should do so. The court, also, held in that case, that as the evidence showed that there was no promise on the part of the lessor to keep the premises in repair and that as the tenant had been in possession of the premises a year before the lease in question was executed, it could not reasonably be claimed that the lessor should be charged with more knowledge of the defective condition than the tenant himself, and so there was no liability. In stating the import of that case, the court said, "The question presented here is one of duty of the landlord toward the servant of his tenant, under a letting in which the tenant at the time of making the lease had at least an equal opportunity with the landlord to know any defective condition of the premises and expressly stipulated in the lease that he would keep the premises in repair." The essence of that case is that where a landlord has made no promise to keep the premises in repair and it is not shown that he had any knowledge of the defective condition at the time of the letting, the principle of caveat emptor applies and the landlord is not liable.

In Mikuss v. Kaha, 307 Ill. App. 258, the court held that where a child, of a tenant of a portion of a building, was injured by being struck by a protruding bolt in a door on the premises, an action in part for the benefit of the

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himself to keep any defendant in good repair of the premises and
expressly stipulated in the contract that he would keep the
premises in repair. The essence of that case is that there
is no liability here as to the promise to keep the premises in re-
pair and it is not shown that he had any knowledge of the
defective condition at the time of collecting the mortgage
of the premises and the defendant is not liable."
In *Clark v. Clark*, 207 Ill. App. 2d, 202, 203, the court
said that there was a duty, as a result of a promise to a
defendant, not to allow the premises to be damaged by a defendant's

of the child, against the owner would not lie. That decision was based on Berggard v. Gale, 205 Ill. 512 and Gronwell v. Allen, 151 Ill. App. 404. The court in the Nikuss case makes some distinction between a suit brought by a third party and not by the tenant or a member of his family. Further, it, incidentally, sanctioned Dustin v. Curtis, 74 N.H. 283, which case is not in accord with the law in this State.

This court held in Gayne v. Laubenheiser, 325 Ill. App. 50, where a guest who had been injured by plaster falling from a ceiling, brought suit against a lessor, and where the evidence showed that the lessor and, also, the guest, at the time of the leasing, knew that the plastering was in a defective condition requiring care, and the lessor promised to remedy the defects, that the lessor was chargeable with carelessness. In the opinion in that case, we used the following language: "The rule applicable to such a case is that the landlord is responsible for his own negligence to the party injured if he lets the premises agreeing to keep the same in repair and fails to do so, in consequence of which anyone lawfully upon the premises has been injured without contributory negligence on the part of the person injured. Whether the plaintiff was heedless or careless in exposing herself to the chance of such an accident as that which occurred from the falling of the plaster was, under the evidence, a fair question of fact for the decision of the jury." In that case, although the defect existed at the time of the letting, and was known to the lessor, the liability was based on the ground that, as the lessor knew of the condition and had promised

THE COURT held in favor of the defendant, and the
verdict was returned in favor of the defendant, and the
court then proceeded to the consideration of the
question of damages. The court found that the
defendant was liable for the injury to the
plaintiff, and that the damages should be
allowed to the plaintiff. The court then
proceeded to the consideration of the
question of the amount of damages. The court
found that the damages should be \$10,000.
The court then proceeded to the consideration
of the question of costs. The court found
that the costs should be \$1,000. The court
then entered its judgment in favor of the
plaintiff, and awarded to the plaintiff the
sum of \$11,000, with costs.

to remedy it, there arose a common law liability for negligence. It should be observed that in the Goyne case the evidence did show that at the time of the letting not only the landlord but the lessee knew that the plastering was in a defective condition, requiring repair, although, as the opinion states, "they did not consider it dangerous."

In Margolen v. de Haas, 226 Ill. App. 110, there was (1) no contract to repair, (2) no latent defect at the time of the leasing known only to the lessor and concealed from the tenant, and (3) no control or possession reserved, and so no liability. That case is based on Gregwell v. Allen, 151 Ill. App. 404. Considering that the court in the Margolen case, however, saw fit to discuss the claim by the plaintiff that there was some evidence of a certain promise to repair which was made after the execution of the lease, it may be inferred that if the lessors had made a covenant to repair, the decision would have been the other way.

In Borggard v. Gale, 305 Ill. 511, where the plaintiff testified that there was a hole six by twelve inches in size in the floor of a small room opening off a store-room when her husband - the lessee - took possession of the premises, the existence of which was unknown to her or her husband, and that a day or two thereafter she unavoidably stepped into the hole and was injured, - the court held that an instruction "that the defendant was not liable to the plaintiff for any injuries which she may have sustained after her husband took possession of the premises under the terms of the lease, even though said premises were let with a nuisance upon them by means of which the injury was received, unless, through the fraud

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, entitled "An Act to provide for the better management of the public lands, and for other purposes."

or concealment of the defendant, the husband was induced to take possession of the premises without knowledge of the existence of such nuisance," was good. That case on the facts, is not in point.

In Marcovitz v. Hergenrether, 302 Ill. 152, the administrator of the estate of a teamster, one Marks, brought suit against the lessors and lessees of certain premises. On demurrer, the court held that the declaration did not state a cause of action. The first count was based upon an ordinance, and the second count, on an alleged obligation on the part of the defendants to protect and enclose a certain elevator well. The occurrence recited in the declaration was to the effect that the deceased, while engaged in unloading one of his wagons into an elevator or hoisting apparatus in the elevator well, owned, leased and operated by the defendants, unavoidably slipped and fell from his wagon into the elevator well and was killed. As that case, in the first count, involved the effect of an ordinance providing for the protection of elevator wells, and in the second count, an obligation to secure the fence and enclose the elevator well, it is not here, on the facts, directly in point. In that case, however, after stating that neither count stated a cause of action against the owners of the property, the court said, "In order to charge the owners of the leased premises with responsibility for the existence of the alleged defective elevator, elevator well or hoistway, it was necessary for plaintiff to allege and prove that the conditions complained of existed at the time of the letting, or that the owners had covenanted to

repair or to remedy the condition or nuisance complained of." Citing City of Chicago v. O'Brennan, 65 Ill. 160; Gridley v. City of Bloomington, 68 id. 47; West Chicago Masonic Assn. v. Cohn, 132 id. 210. The court further stated, "The declaration contains no allegations as to when the property was leased, that the nuisance existed in the hoistway at the time it was leased, or that there was any covenant to repair by the owners."

The O'Brennan case is not in point, as there suit was brought against the City for an injury sustained by the plaintiff by reason of a portion of the plaster in the Council Chamber falling and striking him, and there was evidence tending to show that no other party was bound to keep the premises in repair but the City itself. In the Gridley case, however, although decided, in part, on the ground of a variance and, in part, on the ground that the evidence failed to show an express agreement on the part of the owners to make repairs, Mr. Justice Schofield used the following language:

"The general rule is, that the occupant, and not the owner, as such, is responsible for injuries received in consequence of a failure to keep the premises occupied in repair. Chicago v. O'Brennan, 65 Ill. 160; Chatham v. Hanson, 4 Durn. & East, 318; City of Lowell v. Spaulding, 4 Cush. 277; Fisher v. Thirkell, supra; 1 Chitty's Pleadings, 95; Taylor on Landlord and Tenant, sec. IV, Par. 192; 3 Robinson's Practice, 676, 4; Shearman & Redfield on Negligence, 2d Ed. Par. 56. To this general rule, the authorities recognize these exceptions: 1. Where the landlord has, by an express agreement between the tenant and himself, agreed to keep the premises in repair so that, in case of a recovery against the tenant, he would have his remedy over; then to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord, but such express agreement must be distinctly proved. * * * 2. Where the premises are let with a nuisance upon them, by

It is further stated that the above named person is not a member of the Communist Party of the United States of America, and that the above named person is not a member of the Communist Party of the United States of America, and that the above named person is not a member of the Communist Party of the United States of America.

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The following is a list of the names of the persons who have been
 named in the report of the committee on the subject of the
 investigation of the case of the late Mr. J. H. Smith, who
 was killed by a train on the 1st of March, 1881, at
 the station at New York City. The names are given in the
 order in which they were named in the report.

means of which the injury complained of is received."

That language was quoted with approval in Boyce v. Tallerman, 183 Ill. 115.

It seems, therefore, from the foregoing analysis of the principal decisions on the subject in this state, that although as a general rule the lessee and not the owner is responsible for injuries received by a third person, as the result of a failure to keep the premises in repair, it is the law that where the lessor has expressly agreed with the lessee to keep the premises in repair, the person who is injured by reason of a failure to repair has a right of action, by reason thereof, directly against the landlord. Such is the law, also, in many other jurisdictions. In Flood v. Pabst Brewing Co., 158 Wis. 626, the court said, "It is true there is a conflict of authority upon this proposition, but we think the weight of authority and the better reason support the doctrine that a landlord who agrees to keep premises in repair is liable to an invitee of the tenant in an action of tort for breach of his duty to repair. Barren v. Liedloff, 95 Minn. 474, 104 N.W. 289; Mesher v. Osborne, 75 Wash. 432, 134 Pac. 1022; Patten v. Bartlett, Ill. Mc. 409, 88 Atl. 375; Stillwell v. South Louisville L. Co., 22 Ky. L. Rep. 785, 58 S.W.606, 53 L.R.A. 325; Edward v. N.Y. & N. R. Co., 310, 66 N.E. 269."

What the law is in regard to the second point made by counsel for the plaintiff, concerning the unsafe condition at the time of the letting, it is unnecessary to state, as the evidence introduced showed that both the lessee and the plain-

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tiff knew the general condition of the pump and pump room, as they had been in the possession of the lessee for some months prior to the accident, and the evidence showed also that the lessee not only had knowledge, but had called the lessor's attention to the condition.

Assuming the law, therefore, to be as we have stated it, was there sufficient evidence to make it necessary to submit it to the jury? We think there was. Inasmuch, however, as a new trial becomes necessary, it would be out of place to comment in detail on what we think the evidence that was introduced did prove. Suffice it to say that the evidence did tend to prove such a condition of the pump and pump room as could not well exist without negligence and did tend sufficiently to prove ordinary care on the part of the plaintiff to justify its submission to the jury.

As the pump and pump room had been used practically every day from August 1, 1921, when the lessee first went into possession, up to April 3, 1922, the day of the injury, it cannot be claimed that the evidence showed concealment of defects, or fraud, on the part of the lessor. After such extended user, it cannot be claimed that the evidence showed ignorance of the condition on the part of the lessee. In our judgment, the cause must be reversed because the evidence showed a covenant by the lessors that they would "at all times keep said premises * * * in good repair and condition," and evidence was introduced tending to show that the premises were not kept in that condition.

With these facts before me, I am compelled to conclude that the evidence is not sufficient to sustain the charge against the defendant. The evidence is not sufficient to sustain the charge against the defendant. The evidence is not sufficient to sustain the charge against the defendant.

It is the duty of the jury to weigh the evidence and to determine whether it is sufficient to sustain the charge against the defendant. The evidence is not sufficient to sustain the charge against the defendant. The evidence is not sufficient to sustain the charge against the defendant.

In the case of the defendant, the evidence is not sufficient to sustain the charge against the defendant. The evidence is not sufficient to sustain the charge against the defendant. The evidence is not sufficient to sustain the charge against the defendant.

The judgment of the Superior Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, a Notary Public in and for the State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same, as the same appears from the records of the County of Dallas, State of Texas.

Witness my hand and seal of office this 1st day of January, 1901.

NOTARY PUBLIC

JOHN W. BROWN, Notary Public in and for the State of Texas.

JOHN W. BROWN, Notary Public in and for the State of Texas.

1901, Jan. 1st

115 - 29524

ALVIN L. BEAR, doing business
as BEAR STEEL & WIRE CO.,

Appellee,

v.

NICHOLAS WIRE & SHEET CO.,
a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 617³

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On January 29, 1923, the plaintiff, Alvin L. Bear, doing business as Bear Steel & Wire Co., filed an affidavit for attachment in the Municipal Court, for \$448.40 against the defendant Nichols Wire & Sheet Co., a non-resident.

The plaintiff's claim, as set up in its affidavit, was for \$398.70, "for freight charges on car Big Four, 47470, and for handling charges in Chicago of \$27.50 and storage of \$35.20."

On the same day, an attachment writ was issued. In that writ S. Ward Hamilton Co. was named as garnishee. On February 2, 1923, the writ was returned. It recited that no property of the defendant was found, and that the writ was served on S. Ward Hamilton Co., a corporation, as garnishee. On February 10, 1923, the appearance of S. Ward Hamilton Co., a garnishee was entered; and on the 13th, that of the defend-

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2331 A. 613

Opinion filed June 17, 1933.

THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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ant, Nichols Wire & Sheet Co.

Subsequently, various motions were made and pleadings filed, and orders made by the court, so that, ultimately, as between the plaintiff and the chief defendant, the issue was upon plaintiff's statement of claim, an affidavit of merits and a set-off by the defendant. As to the garnishee, it filed on May 10, 1923, an answer admitting that it was indebted to the defendant, Nichols Wire & Sheet Co., in the sum of \$2,038.63.

The set-off claimed by the defendant was to the effect that the plaintiff "shipped to the defendant goods and material which were so rusty, pitted, and otherwise defective, that the defendant was obliged to reject same, and the plaintiff did and has to this day neglected and refused to deliver the kind and quality of goods so purchased from it by the defendant."

There was a trial before the court, without a jury, and judgment entered for the defendant against the garnishee in the sum of \$2,038.63; and a judgment in favor of the plaintiff and against the defendant, Nichols Wire & Sheet Co., in the sum of \$446.40, and that the total sum to be recovered by the defendant, be had and recovered for the use of the plaintiff as to the sum of \$446.40, with costs, the residue to be for the use of the defendant. This appeal is by the defendant, Nichols Wire & Sheet Co., from that judgment.

In the brief of counsel for the defendant, only two contentions are made; first, that the court did not have jurisdiction, as the subject-matter of the suit could not be

at time of visit 1980 1981

On the 14th day of May, 1900, the undersigned, being duly sworn, depose and say that the within is a true and correct copy of the original of the same, as the same appears from the records of the Court of the County of Los Angeles, California, and that the same is a true and correct copy of the original of the same, as the same appears from the records of the Court of the County of Los Angeles, California.

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adjudicated and determined in an original attachment proceeding; second, that the judgment was against the manifest weight of the evidence.

(1) The record here shows that the defendant entered his appearance and went to trial on the merits. No special appearance, nor motion to quash, was made.

An examination of the language of the affidavit for attachment shows that the action was brought for \$446.40 upon a "plea of assumpsit," and that that was made up of "freight charges on car Big Four 47470, and for handling charge in Chicago of \$22.50 and storage of \$25.20." From that, it follows - to use the language of Mr. Justice O'Connor in American Lumber Co. v. Leach, 307 Ill. App. 62, - "that as the affidavit set forth the nature and amount of an indebtedness for which a suit in assumpsit could be brought, it was sufficient to give the court jurisdiction." Citing, Raywood v. McGroarty, 33 Ill. 459. It appears, therefore, that the affidavit was sufficient to give the court jurisdiction; and that the defendant, in order to present to this court the question, whether the original attachment was to recover unliquidated damages, should have entered a special appearance and relied upon that and a motion to quash.

In Steele Wedges Co. v. Shooodee Pond Packing Co., 153 Ill. App. 576, there was a motion to quash, which was made in apt time. So, likewise, in Hopsier Veneer Co. v. Trust & Guarantee Co., 283 Fed. Rep. 1.

(2) As to the question whether the judgment was against the manifest weight of the evidence :-

For the plaintiff, two witnesses were called, Alvin L. Bear, the plaintiff, himself a steel merchant, who had done business with the defendant before; and O.J. McAloon, a warehouseman, president and manager of the warehouse where the steel in question was loaded, and the one who superintended the loading of the steel.

There was offered in evidence a copy of the order for the steel. It was as follows; "1 Minimum car 18 gauge O.P.C.R. prime sheets, size 30 x 96 at \$3.00 cwt. net." Also, a copy of the purchase order, which was a duplicate of the just mentioned document. Also, a copy of a telegram from the defendant to the plaintiff notifying the plaintiff that the defendant could not accept the car of merchandise because 50% of it was pitted, rusty and unsalable. Also, a slab of sheet steel, which four witnesses for the defendant testified had been cut from part of the steel shipped, and was a sample of the whole shipment, and which was claimed was in a badly rusted and pitted condition.

Bear testified that he had personally loaded all of the steel into the car and that at that time it was in good condition, neither rusty nor pitted; that he subsequently received a telegram from the defendant rejecting it. He further testified that he then tried to dispose of the car of steel in Kansas City, but as he could not, he ordered it back to Chicago; that McAloon called him up and told him that the car was back; that he, the witness, then went down and inspected the steel and found it in the same condition as when it went out, save as to a little discoloration caused by the air. He further testified that when it arrived in Chicago, he put it in storage; that he paid the freight -

Now the Plaintiff, two witnesses were called.

Alvin J. Reed, the Plaintiff, advised a great number of

the fact that he was the Plaintiff and that he was

Wells, a well-known, prominent and member of the

community where the steel in question was located, and the

and the circumstances of the taking of the steel.

There was offered in evidence a copy of the report

for the steel. It was an "Aluminum" 12 inch diameter and 10 gauge

12 x 12 x 12 inch plate, also 12 x 12 x 12 inch plate.

Also, a copy of the purchase order, which was a duplicate

of the first order and receipt. Also, a copy of a telegram

from the defendant to the Plaintiff notifying the Plaintiff

that the defendant could not accept the use of the defendant's

license for 12 x 12 x 12 inch plate, which was made by the

plaintiff at about 1910, which was witness for the fact

that the defendant had been out of the steel business

and was a member of the steel business, and which was signed

and was a duly signed and dated document.

There testified that he had personally looked at the

of the steel and that at that time it was in

good condition, neither rusty nor broken; that he was

presently received a telegram from the defendant rejecting it.

He further testified that he then tried to dispose of the

one of which he owned 1917, but as he could not, he ordered

it back in 1918; that he then called him up and told him

that the one was made by the witness, then went down

and inspected the same and found it in the same condition

as when it was made, save as to a little discoloration caused

by the fact that it had been in the steel business

the freight bill was introduced - which was \$398.70; for handling, \$22.50 and \$25.20 for storage; that those charges were for shipping, loading and unloading, and putting it back on the floor; that those charges were the reasonable charges for what was done. On cross-examination, he testified that the order was properly filled; that prime sheets, mean first-class, and that the defendant said it had rejected the goods because they were rusty; that when the steel was returned it was in good shape.

McAloon testified that he superintended the loading of the steel and that it was in good condition and free from rust; that he was there when it was returned and that it was then in the same condition as when it was shipped; that there was no apparent rust, save a little discoloration on the outside of the top sheets which might have been caused by atmospheric conditions. He further, testified that the charges made were the usual, customary and ordinary charges for the services rendered.

One Riley, for the defendant, testified that he was in the steel tank business, and in June, 1922, Kellerstrass brought a sample of steel sheet to him for inspection, and that he examined it with reference to buying steel sheets from the defendant; that the steel in the sample was rusty along the edges and very badly pitted. On cross-examination, he said that it was not only pitted, but half rusted away; that it would have been "prime" if it had not been for the pitting along the edges; that, however, he did not know where the sample came from.

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One McGanless, foreman for the defendant, testified - by deposition - that he examined the car in question two hours after it was opened, and that the steel sheets were rusty and pitted along the edges from half an inch to almost two inches; that on some of the sheets it ran clear across; that he handled 75 or 100 of the sheets, and was in the car two or three different times; that the pits on the sheets were almost half way through. On cross-examination, he testified that none of the sheets were taken out of the car; that the sheets, approximately, complied with the gauge specified.

One Kellerstrass testified that he was the manager of the sheet department of the defendant; that he inspected the car upon its arrival, and found the steel to be the proper size and proper gauge, but not the proper quality; that the sheets were rough and pitted, and some rough about the edges; that he wired the plaintiff as to the condition in which he found it. He further testified that the sample that was shown him, and which was put in evidence, was an average sample, not the best, nor by far, the worst. He further testified that he practically handled one-fourth of the car, taking the piles down and shifting them around, and made a careful inspection; that he telegraphed the plaintiff, and then ordered the car reshipped. He further testified, that the sheets were not prime sheets; that prime sheets meant an excellent, perfect sheet.

One Hudson, vice president of the defendant company, testified that he examined the car and the top sheets were yellow and rusty; that he and Keller strass began to

The following is a list of the names of the persons who were present at the meeting held on the 10th of the month, 1888. The names are given in the order in which they were called. The names of the persons who were present at the meeting held on the 10th of the month, 1888, are given in the order in which they were called. The names of the persons who were present at the meeting held on the 10th of the month, 1888, are given in the order in which they were called.

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The following is a list of the names of the persons who were present at the meeting held on the 10th of the month, 1888. The names are given in the order in which they were called. The names of the persons who were present at the meeting held on the 10th of the month, 1888, are given in the order in which they were called. The names of the persons who were present at the meeting held on the 10th of the month, 1888, are given in the order in which they were called.

shift the sheets in the piles and inspect them and look at them; that the edges were pitted and rusty; that they had ordered prime sheets - first grade; that prime means good. He, also, identified the sample that was offered in evidence.

One Nichols, who had been in the steel business about twenty-five years, testified that he examined the steel in question and that it was badly damaged; that the description in the order meant perfect sheets, free from rust or blemish of any kind; that the sheets received from the plaintiff were not of that character, and were badly damaged by water. He then identified the sample which was introduced in evidence, and said that it was cut in his presence. He further testified that the car had been originally sold, but that Kellerstrass said he could not use it to fill that order on account of defects. He further testified that he examined the sheets in the car and that he could see the ends of all the sheets, and that practically every one was damaged; that it was not atmospheric rust, but that the rust was caused from water.

The plaintiff upon being recalled, testified that when the car came back and was unloaded, he saw no sheet from which the sample might have been cut. He further testified that the car was in good shape when returned; that it was sold; that there were 700 sheets in the car when it was shipped, and only 668 when it was returned.

McAloon, recalled for the plaintiff, testified that he had counted the sheets as they went into the car; that there were 700; that when the car was unloaded, there were

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that when the case was heard and the judgment, it was in
favor of the plaintiff, the court in the case being out, in the
other judgment that the case was in good shape when presented,
it is not only that there were no errors in the case when
it was presented, but also that it was correct.

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only 668 sheets.

It will be seen from the foregoing that there is a direct conflict in the evidence as to the condition of the steel in question, and whether it complied with the terms of the sale. There is no doubt but that the evidence of Bear and McAloon, taken by itself, sufficiently proves that the order was carried out by the plaintiff, and that the steel was in accordance with the contract. The physical condition of the steel at the time of the delivery was necessarily difficult to describe. To what extent the sheets of steel were rusty or pitted, and whether to such an extent that they were not of merchantable quality and fulfilled the terms of the contract, it was necessarily difficult for the court to decide. Unfortunately, we are not in as good a position to pass judgment upon the credibility of the witnesses as the trial judge, although it is true that two of the defendant's witnesses testified by deposition. Considering the situation as it is, as it appears to us in the record and also, the sample of the sheet steel which was offered in evidence, and which we have examined, we do not feel justified in overriding the judgment of the trial judge as against the manifest weight of the evidence.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMPSON, J. CONCUR.

only the theory.

It will be seen that the foregoing does not

in a direct manner to the question of the

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134 - 29534

SAMUEL R. RAPPOLD,

Appellee,

v.

TIMOTHY F. McELLIOTT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

239 I.A. 617⁴

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 23, 1922, the plaintiff, Samuel R. Rappold, brought suit against the defendant, T. M. McElliott, for real estate commissions amounting to \$300.00. Two trials each before the court, with a jury have been had and in each case there was a verdict for the plaintiff in the sum of \$300.00. When the first verdict was brought in, the trial judge granted a motion of the defendant for a new trial. This appeal is from the judgment entered on the second verdict which was brought in against the defendant in favor of the plaintiff in the sum of \$300.00.

The statement of claim of the plaintiff recites, that this claim is for moneys due him for services rendered to the defendant under a certain contract of July 11, 1921, under the terms of which the defendant employed the plaintiff to procure a purchaser for and to sell his property located at 5123 Milwaukee avenue; that the plaintiff secured a purchaser for the defendant for the property in question, and that

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ALBERT E. BROWN

Attorney

ALBERT E. BROWN

ALBERT E. BROWN

ALBERT E. BROWN

2331 A. 617

ALBERT E. BROWN

Opinion filed June 17, 1935.

THE COURT

THE COURT

On May 22, 1935, the plaintiff, Albert E. Brown,

through his counsel, the defendant, J. E. Brown, the said

plaintiff, submitted the following in support of his claim:

Before the court, there is a copy of a check for \$100.00

which shows that it was cashed for the plaintiff in the sum of

\$100.00. When the check was cashed in the bank,

the bank issued a note to the plaintiff for the same.

This note is now in the possession of the plaintiff and

has been used by him in payment of the debt in favor of

the plaintiff in the sum of \$100.00.

The statement of claim at the plaintiff's request,

that this claim is for money due him for services rendered

to the defendant under a certain contract of July 11, 1933,

which the terms of which the defendant alleges are as follows:

It is agreed between the two parties that the plaintiff should

at this time request that the plaintiff be allowed a sum

equal to the amount of the property in dispute, and that

the name of the purchaser was Mrs. Frances Trotter; that she bought the property from the defendant, and that the plaintiff was the sole procuring agent of said sale; that the sale was consummated and a warranty deed executed on October 3, 1921; that Frances Trotter, for the purpose of defrauding the plaintiff and depriving him of his commissions, took title to the property not in her own name, but in the name of Tina Sternola; that, although Tina Sternola was the grantee named in the deed which conveyed the premises, Frances Trotter was the real purchaser, and was induced to purchase the property by the plaintiff. It further recites that for the services rendered, the plaintiff is entitled to the sum of \$300.00.

The defendant filed an affidavit of merits, in which he denied that the plaintiff procured a purchaser for the premises, and set up that he himself sold the property.

The evidence shows that on July 11, 1921, the defendant, by a signed writing, listed his property, 5123 Milwaukee avenue, with the plaintiff at the latter's real estate office and authorized the plaintiff to sell it for \$7500, and promised to pay to the plaintiff a commission of \$300.00.

The plaintiff testified that after the property was listed with him by the defendant, he advertised it and showed it to a number of customers; that in July, 1921, he sold for Frances Trotter her property which she then owned on Lockwood avenue; that at that time she told him she wanted to buy another piece of property from him, but wanted something on Milwaukee avenue; that he told her that he had a piece of property that

was listed just a few days ago; that he would show it to her; that that was on July 21, 1921; that he took her over that evening about 6:30 to 5123 Milwaukee avenue; the property in question, and showed it to her; that "she liked it very well, but it was getting late and she did not have time to go through the house;" that on July 30, he tried to get her over several times; that she was busy; that on that day he took over another party, and met there on the premises Mrs. Trotter and a Mrs. Borgmeier, and found they wanted to go through the house but the tenant would not let them in; that they finally got the tenant to let them in, and he, the plaintiff, showed them through; that at that time she said she liked the house very well, and that she thought she would buy it. He further testified that on August 1, 1921, he was notified by the defendant to take the property off the market; that on August 4, he and one Milner, one of his employees, went to the home of the defendant and asked him whether the sale had been made to any of the people that he had shown the property to; that the defendant in answering, said that he had made the sale himself, and that the plaintiff had nothing to do with it; that he, the plaintiff, then asked the defendant if Mrs. Trotter bought it, and the defendant answered in the negative. He further testified that he examined the records and found that title was transferred to one Tina Sternola, and that the price was \$7200, being the price that he had submitted to Mrs. Trotter, less the commission; that the date of the transfer was October 3, 1921. Milner, the salesman for the plaintiff, corroborated the latter in regard to submitting the property to Mrs. Trotter. He testified, also, that he had a conversation with her about the 5th or 6th of August, and that she told him she was inter-

ested in the property. He also corroborated the plaintiff in regard to the interview with the defendant when the latter notified the plaintiff to take the property off the market.

The testimony of one Anna Marks, a neighbor of Frances Trotter, is significant. She stated that in August, 1921, on her own premises, she asked Frances Trotter if she had yet procured a home, and upon receiving an answer in the affirmative, asked her where, and she said, "5123 Milwaukee avenue. You must come over and see me sometime;" that Frances Trotter described the property and said it would be valuable some day; that she, the witness, asked her what she paid for it, and Frances Trotter said, \$7500.

The record shows that Frances Trotter was called as a witness by the court. She testified that the plaintiff sold for her the property where she had formerly lived on Lockwood avenue, but denied that in the month of July, 1921, she had any talk with the plaintiff in regard to purchasing another piece of property. She denied, also, the conversation testified to by the plaintiff's witness Milner. She admitted that on August 17, she sold some property which she had on Long (sic) Avenue and received \$6,000 cash for it. She denied the conversation testified to by the witness Anna Marks. When asked if she bought the property at 5123 Milwaukee avenue, she answered in the negative, and denied that any one bought it for her. She stated that Tina Sternola, was her niece, that she was twenty-six years of age and a stenographer. She denied going to the premises in question on August 21 with the plaintiff; or that she went there at any time with him. She testified that in the latter part of July

she was there with Mrs. Borgmeier, and that while there, the plaintiff and another man came in, but she did not talk to him about property. She further testified that her niece, Tina Sternola found out about the property from Mrs. Borgmeier. After being examined by the court, she was called as a witness for the defendant. She then testified that when she sold her own place she moved to Mrs. Borgmeier's basement for about thirty or forty days, and then to the premises in question, 5123 Milwaukee avenue, where she had the whole house, and for which she paid \$30.00 a month rent.

Mrs. Langdon, who was Tina Sternola before she was married, testified that Frances Trotter was her aunt; that in August, 1931, she visited Mrs. Borgmeier, and that the latter told her she, Mrs. Borgmeier was thinking of buying a place, but that she could not take it, and that it would be a good investment for her, the witness, that she should investigate it and "she would take care of it for me, and the time came when we had to meet over at Mrs. Borgmeier's home and Mr. McElliott - that was the time I met Mr. McElliott & Mrs. Borgmeier, Mr. Borgmeier, myself and the attorney, I guess, so far as I remember were all there. I signed the contract and paid \$1,000 as a deposit, and sometime later, on October 3, I paid three more \$1,000, making \$4,000 already paid, the rest to be paid on notes." She further testified that she did not have any conversation with her aunt Mrs. Trotter about the property; that she thought as her aunt was out of a flat, her aunt could live in the basement; that she could rent it to her aunt, until she, the witness, was ready to occupy it; that she, the witness, later moved into the property, - that

she got married on June 2, 1921; that her aunt paid her \$30.00 a month rent for her house. She further testified that she first became acquainted with the defendant on August 14, the day she signed the contract. She further testified that she made a payment of \$1,000 from money she drew out of her Savings Account which she had at the North Avenue State Bank in the name of Tina Sternola, about a week before August 14, 1921; that she paid \$3,000 in October in cash, which came from \$3,000 in gold bonds which she had bought with money inherited from an uncle; that she sold them to friends.

She further testified that before she signed the contract to buy the property, she had only looked at it from the outside; that "she was satisfied from the way it looked outside; she was not very particular." She further testified that she "didn't care so much about the interior of the house, I was satisfied with the way it looked outside;" that she never saw the interior of the house before she bought it.

The witness Zander, Assistant Cashier of the North Avenue State Bank, testified that he had made a search of the records of the Bank with reference to an account of Tina Sternola. His testimony shows that, in the month of July, 1921, she had no account whatever in the bank. Her account was opened October 3, 1921, and a deposit made of \$56.25 and that no deposits were made ^{prior} to that time. Zander's testimony does not appear in the abstract.

The witness Mrs. Borgmeier, testified that she bought the property the latter part of July from the defendant, and gave him \$50.00 down; that he told her that was not enough earnest money, so that on August 9, she gave him another

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check for \$50.00. She further testified that between August 9 and 14, she urged Tina Sternola, whom she had known for many years, to take the property, and that Tina Sternola agreed to do so, and that they met at the house of the witness, and the contract was signed; that at the time the contract was signed, Tina Sternola gave her \$100.00 and \$900.00 to the defendant; that that was on August 14. She further testified that she and Mrs. Trotter, after the latter came to live in her basement, went over to the house in question; that while they were there the plaintiff came up in an automobile with another man; that they went into the house and the plaintiff insisted on showing them around, although they told him they had seen it; that there was no conversation between the plaintiff and Mrs. Trotter.

The defendant testified that the plaintiff never came to him with a buyer for the property at any time, or informed him that he had a buyer for the property; that the plaintiff did not produce Tina Sternola, and never informed him, the defendant, that she was interested in the property; that he sold the property to Tina Sternola, who was brought to him by Mrs. Borgmeyer. On cross-examination, he testified that Mrs. Borgmeyer made her first deposit the latter part of July; and that the second deposit was made on August 9; that the contract was signed on August 14, and \$1,000 paid down; that Mrs. Borgmeyer had told him before, that she did not think she could take the property, but that she had a friend who would take it.

The evidence of the plaintiff and his witnesses made out a prima facie case. Did the evidence for the defendant

overcome it? That was the question for the jury, and they answered it by a verdict for the plaintiff. The evidence is conflicting. Are there such discrepancies, that justify us in concluding that that verdict is against the manifest weight of the evidence? Credibility was the subject the jury must conspicuously have had in mind. Evidently they did not give credence to the testimony of Tina Sternola, Mrs. Trotter or Mrs. Borgmeier. Certainly the testimony of Tina Sternola in regard to how she paid for the property, the source of the money, in the face of the testimony of Zander, who procured the original entries of the bank, was shown to be unworthy of credit; and if the jury considered her as unworthy of belief, then it was not difficult for them in reasoning over the testimony of Mrs. Trotter, Mrs. Borgmeier and the defendant, to conclude as they did. Tina Sternola testified that she bought the property without ever going inside the house; that did not invite confidence in her. Taking into consideration all the evidence, as it appears in the record, it would not be reasonable for us to override the verdict of the jury.

Two instructions are criticised as erroneous. Altogether, the record shows what purports to be fifteen instructions as given. Only two are set forth in the abstract. That is not sufficient to justify consideration of the objections made. However, we have examined them all, as they appear in the record, and find no error sufficient to justify a reversal.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

200 - 29617

JAMES TINLEY,

Appellee,

v.

ISIDORE PHILLIPS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 618

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, James Tinley, brought suit against the defendant, Isidore Phillips, in the Municipal Court, for real estate commissions, and recovered a verdict and judgment in the sum of \$1,000.00. This appeal is therefrom.

The cause was tried upon an issue made by an amended statement of claim and an affidavit of merits. The statement of claim alleged that the defendant, on or about January 4, 1923, listed with the plaintiff the property known as 4602 - 4610 N. Monticello avenue, Chicago, Illinois, and requested the plaintiff to sell the property; that the plaintiff exhibited it to numerous prospective purchasers, one of whom was Joseph Coopersmith; that after the plaintiff had exhibited it to him, the defendant sold it to Joseph Coopersmith for \$145,000.00; that the plaintiff was a duly licensed real estate broker and acted as such when exhibiting the property; that by reason of the sale, he, the plaintiff, became entitled to the usual, regular and customary commission of 3% on the price for which the property was sold, which is \$4,350.00.

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The defendant's affidavit of merits admitted that he listed the property with the plaintiff and requested him to sell it; and alleges that at that time, he told the plaintiff that he had listed the property with several brokers for sale, and that if the plaintiff should sell it as requested, he and the defendant "should" agree upon the amount of the commissions; that the amount of commissions should be fixed by a separate agreement. The affidavit of merits denied that the plaintiff exhibited the property to any prospective purchasers; denied that the plaintiff exhibited the property to Joseph Coopersmith; denied that the plaintiff introduced Joseph Coopersmith to the defendant as a prospective purchaser; denied that the plaintiff rendered any services in connection with the sale of the property; denied that the plaintiff was the procuring cause of the sale, or sold the property; denied that he, the defendant sold it for \$145,000.00, or that he sold it to Joseph Coopersmith. It, further, denied that the plaintiff was a duly licensed real estate broker and acted as such in exhibiting the property to the purchaser; denied that the plaintiff is entitled to the usual and customary commission of 3% on the selling price; denied that the defendant agreed to pay the plaintiff 3% as commissions. In the affidavit of merits it was alleged that the defendant told the plaintiff that he would not pay him 3% on the selling price as a broker's commission, and that he would not pay the plaintiff the usual and customary commission.

It is contended on behalf of the defendant that the plaintiff was not a licensed real estate broker at the time the alleged services were rendered. The plaintiff, Finley,

The defendant's affidavit of service submitted that
he listed the property at the plaintiff's and requested
him to sell it; and alleges that at that time, he sold
the plaintiff that he had listed the property with
himself for sale, and that if the plaintiff should sell it
before, he and the defendant "share" agree upon the amount
of the payment; that the amount of commission should
be fixed by a separate agreement. The affidavit of service
denied that the plaintiff exhibited the property to any one
other person; denied that the plaintiff exhibited the
property to any person; denied that the plaintiff in-
tended to sell the property to the defendant as a prospective
purchaser; denied that the plaintiff intended any person
in connection with the sale of the property; denied that the
plaintiff was the prospective owner of the sale, or sold the
property; denied that he, the defendant sold it for
\$15,000.00, or that he sold it to anyone else; denied that
anyone, except that the plaintiff was a duly licensed real
estate broker and acted as such in exhibiting the property to
the defendant; denied that the plaintiff is entitled to the
usual and customary commission of 5% on the selling price;
denied that the defendant agreed to pay the plaintiff 5% as
commission. In the affidavit of service it was alleged that the
defendant told the plaintiff that he would not pay him 5% of the
selling price as a broker's commission, and that he would not
pay the plaintiff the usual and customary commission.

It is submitted on behalf of the defendant that the
plaintiff was not a licensed real estate broker at the time
he sold the property.

testified that he had been engaged in the real estate business for about 24 or 25 years, and when asked whether he was a duly licensed broker in the City of Chicago and State of Illinois, he answered, "yes". There was offered in evidence a certificate from the State of Illinois Department of Registration and Education, dated January 24, 1923, which showed that he was registered and entitled to act as a registered real estate broker from January 24, 1923, until February 1, 1924, and there was, also, offered in evidence a permit from the City of Chicago, dated January 10, 1923, giving him permission to conduct the business of real estate broker in the City of Chicago until January 1, 1924. The plaintiff also testified, "I have been a licensed broker for my own account for about thirteen years." Although no certificate from the State Department of Registration was offered in evidence which covered any period prior to January 24, 1923, yet, as it is the uncontradicted testimony of the plaintiff, that he had been in the real estate business for about twenty-five years, and when asked the question, "And you have been a licensed broker all this time?" he answered, "I have been a licensed broker for my own account about thirteen years;" the evidence sufficiently proves that at the time in question, when the alleged services were rendered, he was a licensed broker. Maliss v. Cannon, 148 Ill. App.379.

The evidence as to the employment and services of the plaintiff is very conflicting. The plaintiff was in business as a real estate broker at 3536 Lawrence avenue, Chicago. He had in his employment as sales people in 1923,

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Miss Palmer, Mr. Mauzy and Mr. Kerlin. The plaintiff himself, personally, had nothing to do with the transaction in question. Mauzy testified that on January 4, 1923, the defendant came to the plaintiff's place of business and he had a conversation with him in regard to the building in question; that the defendant gave him data in regard to the building, which contained thirty-one flats; that he, the witness, made a memorandum on a card at the time the particulars were given him, writing out the matter word for word; that the listed price given him and which he marked on the card was \$160,000; that there was a mortgage on the property of \$120,000. He further testified that he asked the defendant in regard to the \$160,000 including the real estate board commission.

The witness Helen Palmer testified that on January 5, 1923, she called one Joseph Coopersmith on the telephone; (there is some confusion in the record in regard to the way in which Coopersmith's name is spelled; sometimes it is spelled with a "C", and sometimes with a "K") that as a result, Joseph Coopersmith came in with his wife and his grandson; that then she and Kerlin, who worked in the office and understood the Jewish and German languages, went out to the property in question and showed it to Joseph Coopersmith and his wife; that she told Joseph Coopersmith that the price was \$160,000; that he asked if he could get the building any cheaper; that she told him that very likely he could; that on their return to the office Joseph Coopersmith said he would give \$145,000 for the pro-

Witnesses, Mr. Henry and Mr. Harrison. The plaintiff himself, personally, had nothing to do with the transaction in question. Henry testified that on January 1, 1912, the defendant came to the plaintiff's place of business and he had a conversation with him in regard to the building in question; that the defendant gave him data in regard to the building, which contained things such as that; that he, the witness, made a memorandum on a card at the time the defendant was given him, writing out the matter in full; that the listed price given him and which he wanted on the card was \$125,000; that there was a mortgage on the property of \$120,000. He further testified that he asked the defendant in regard to the \$25,000 including the real estate agent commission.

The witness Henry Harrison testified that on January 1, 1912, he called one Joseph (phonetic) in the telephone. (There is some question in the record in regard to the way in which Joseph's name is spelled; sometimes it is spelled with a "D", and sometimes with a "T") that he is a Jew, Joseph (phonetic) and is with his wife and his children; that when the witness was asked in the office and understood the Jewish and German language, that out of the property in question and about it is Jewish (phonetic) and his wife; that the said Joseph (phonetic) that the wife was told that she would not be building the property; that she was told very likely in order that he might receive the title.

perty, \$25,000 to be in cash, and asked her to make that proposition to the owner of the building, and if satisfactory, they would have a meeting down town the next day with his attorney and draw up a contract. She further testified that after she came back to the office she called the defendant on the telephone and told him "we had a prospective purchaser, Mr. Koopersmith, I believe, at 2110 North Spaulding avenue," that he would give \$145,000 for the building; that the defendant said "the price would be all right and everything, and to get a deposit;" that the defendant wanted to know if the item of \$25,000 for his equity was to be in cash, and if there was to be any second mortgage, and told her to call him back when they had gotten a deposit, or when they had arranged for taking a deposit; that she then asked Kerlin to call Mr. Koopersmith that evening. She further testified that the next day Kerlin called up Mr. Koopersmith, who said he would withdraw his offer; that he said "There were no pantries in some of the flats, and the cupboards were dark, they weren't ligh enough; that both he and his wife objected to that character of a building;" that his son, also, objected to it; that he had his son go through the building with him; that Mr. Koopersmith said he was going to have his son purchase it with him. She further testified, on cross-examination, that later in the year, on February 15, 1923, she called the defendant on the telephone and told him that she had heard that Mr. Koopersmith had bought the building; that the defendant said, "yes, he didn't know whether it was my customer, but Mr. Koopersmith had made an affidavit that there was no broker in the deal, he had never

seen any broker; that he (evidently meaning the defendant) was protected because he had an affidavit from Mr. Koopersmith, and they had entered into a contract." She further testified that later she and Kerlin went to see the defendant, and that she told the defendant they had "come down to see what we could do with reference to a contract he had made with our client Mr. Koopersmith. He said he was sorry anything of that kind had taken place; he was sorry, but he said that Mr. Koopersmith had made an affidavit that there was no broker in this deal, and no commissions to be paid. He had never seen a broker, but he didn't want to do anything that wasn't right, and would arrange a meeting between ourselves and Mr. Koopersmith so we could thresh it out together," and "that he would be glad to arrange this meeting between us, because we had had dealings before and he was sorry that anything of that kind had happened;" that he said he would get in touch with Koopersmith and make an appointment, and that she, the witness, would call him the next morning; that she called him the next morning, but could not get in touch with him; that she left her number, but he never called her back; that the conversation just related was the last one she had with him.

A document containing the words, "Building at No. 4602-10 N. Monticello Ave. No. of apts. 31. Owner I. Phillips. Price \$160,000.00," was introduced in evidence, which the witness testified was a carbon copy of the original which she gave to Mr. Koopersmith on January 5, 1923. On cross-examination, she testified that in her conversation with the defendant over the telephone on January 5, the defendant asked if the

\$145,000 included the commission, and that she told him it "would have to include our commission. He didn't seem to object to that. There was nothing said about the commission at that time."

She further testified on cross-examination that Mr. Coopersmith said he was going to buy it, together with one or two of his sons. She further testified, on cross-examination, that in the conversation she had on or about February 15, with the defendant, the defendant said that he had sold it to a Mr. Coopersmith; that she did not remember whether he said to which Coopersmith, or whether it was Joseph Coopersmith; that she told the defendant in that conversation that "this Mr. Kooperemith lived at 2110 North Spaulding Avenue," and he said, yes, that was the same Cooper-smith. She further testified, on cross-examination, as follows: "Yes, he said he was buying with his son, and he gave me the name of Charles Coopersmith, also. I told Mr. Phillips that "I understood the building had been bought by these people at that address, and he said, yes, they said there was no brokerage to pay, and they had made an affidavit to that effect, and therefore that he was protected;" that at the time she talked to Phillips, about February 15, Joseph and Charles Coopersmith were the only Cooperemiths she knew. On re-direct examination, she testified that in a conversation with the defendant on January 5, she mentioned the name of Charles Coopersmith, and when asked again in regard to the general conversation that took place over the telephone on January 5, she testified that the defendant wanted to know if the \$145,000 included commission; that she told him, no,

\$145,000 would not include commission.

The defendant, Isidore Phillips, testified that on January 4, 1923, he saw Mauzy in the plaintiff's office, and gave him the price of \$165,000.00 and told him the commissions would be \$1,000.00 and Mauzy said that would be satisfactory. He further testified that on a prior occasion, in 1921, he paid the plaintiff a commission of \$1,000.00 for the sale of another building about the same size. He further testified that the first time he talked to Morris Coopersmith was in the 1922 holiday season; that the next time was a few days later, and Morris Coopersmith offered him, the defendant, \$145,000.00; that he refused to take it and told him the price was \$150,000.00; that he did not talk with Joseph Coopersmith about the building prior to January 5, 1923; that he did not talk with Miss Palmer over the telephone on January 5, 1923, nor between January 1, and March 1, 1923; that he had a talk with Miss Palmer and Mr. Kerlin after the property was sold; that she said she had a party named Joseph Coopersmith interested in the property and was entitled to the commission; that he told her he was sorry, that he did not know anybody by that name.

On cross-examination he testified that he saw Morris Coopersmith concerning the property at least twelve times prior to talking with Mauzy in plaintiff's office; that in the month of December, 1922, they arrived at the figure \$145,000.00; that they did not enter into a contract at once because the building was not quite completed and he, the defendant, was trying to get more money for it; that the

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The above-mentioned information was obtained from the records of the Department of Social Services, New York City, which are maintained by the Bureau of Social Services, Division of Child Welfare.

deal, however, was actually closed at the end of December, although, later, he testified that he listed it with the plaintiff before the final offer and acceptance by Morris Coopersmith.

In the course of the trial, it was, apparently, agreed by counsel that the title to the property was bought in the name of one Berger, a director of the Division State Bank, and that as Morris Coopersmith did not have sufficient money to pay down, the money was borrowed from the bank and the title taken in the name of Berger as security.

The witness Joseph Coopersmith testified that he and his wife went with Miss Palmer, about January 4, to look at some properties; that when she showed them the property in question, he told her that his son had already handled that property. On cross-examination, he testified that he did not tell Kerlin, or Miss Palmer, that he would give \$145,000.00 for the property. He further testified that he told Kerlin he was not his, the witness's agent, that his son Morris had handled that property about ten days before. He further testified that he was not an owner, or part owner, of the building, that he did not have any money in it, and, further, denied that Miss Palmer gave him the document referred to above, descriptive of the building and reciting the owner and the price. His wife, Waldo Coopersmith, corroborated him, and testified that she told Miss Palmer that her husband had looked at that property about a week before, and that her son handled it with Mr. Phillips. On cross-examination, she testified that she first looked at the

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building about a week before, with her son, and that her son Morris told her, before that time, that he was talking to the defendant about the building.

The son, Morris Coopersmith, testified that he first talked to the defendant about the building in question about Christmas, 1922; that he saw him a few days after that; that he inquired of the janitor, and he told him where the defendant lived, and he went to the defendant and negotiated with him personally; that he saw the defendant quite a few times prior to January 24, 1923; that after he saw the property in December, 1922, he told his father about it; that he himself moved into the building in February or March, 1923, immediately after the deal was closed up. Pertaining to the closing up of the deal, he was asked if his father signed any notes to the Division State Bank, and he answered that he did not remember, and when asked if he would state positively whether his father signed those notes, he answered, "I cannot state anything I don't remember." He further testified that the account in the Division State Bank was kept in Berger's name, and that his father had a savings account in that bank in January, 1923. He further testified that his father told him that he had been to see the building on January 5; that he, the witness, had informed his father prior to that time that he, the witness, was going to purchase the building.

The witness Berger testified that he was a lawyer, and that he took title to the property in question; that he thought the consideration was \$140,000.00; that the defendant was present at the time of the sale of the property, and he, the witness, was the attorney for Morris and Joseph

Coopersmith, and, also, attorney for the Division State Bank; that the money loaned was not advanced "particularly" on that piece of property. When asked to state if he knew who the signers of the notes were, for the money he obtained, he answered in the affirmative, and when asked to state to whom the notes were returned, he refused to do so, on the ground of privileged communication; and when asked if he did not tell counsel for the plaintiff that he knew that the notes were signed by Morris and Joseph Coopersmith, he refused to answer on the same ground.

It will be seen from the foregoing that the evidence was not only voluminous, but very conflicting, and whether the plaintiff was entitled to recover was almost entirely dependent upon what the jury determined concerning the credibility of the various witnesses. It is claimed, on behalf of the defendant, that the property was not bought by Morris Coopersmith. Still, the evidence on that subject shows that title to the property was actually taken in Berger in trust, but in trust for whom? It may well be that the actual sale brought about by the plaintiff was made by the defendant for the benefit of Joseph Coopersmith. It is not claimed that, although the title was taken in the name of Berger, he was the purchaser. Further defendant's story as to the sale in December, 1922, to Morris Coopersmith, seems to be somewhat inconsistent with the fact, which is practically admitted by him, that he listed the property on January 4 or 5 with the plaintiff. Berger testified that he had been the attorney for both Morris and Joseph Coopersmith for six years, and was, also, the attorney for the Division State Bank, which seems

to have advanced most of the money to buy the property in question, and that the title was placed in Berger to secure the money advanced. Just what the details of that transaction were, it is true, the evidence does not show, although it would not have been difficult for the defendant to show who signed the notes, and who became responsible for the money borrowed from the Bank. Morris Coopersmith testified, that he did not even recollect how much cash he had paid when purchasing the building, and that he was unable to remember whether his father signed any of the notes that were given to the Division State Bank. The testimony of Miss Palmer was, that Joseph Coopersmith told her that he was going to have his son purchase the building with him; that they were going to buy it together. There are many discrepancies in the testimony of the witnesses for the defendant.

It is admitted that the property was listed with the plaintiff, and that it was sold, and it may be that the jury, considering all the evidence, believed that although the title was taken in the name of Berger, and although Morris Coopersmith testified that he bought it, nevertheless, in reality, the sale was made, through the plaintiff, to or for Joseph Coopersmith, or in reality to him and Morris Coopersmith; and analyzing here what the record shows, we do not feel that we would be justified in overriding the determination of the jury.

Inasmuch as the defendant himself testified that when he listed the property with the plaintiff, he promised to pay a commission of \$1,000, if the sale was brought about by the plaintiff, and the verdict of the jury, and the judgment, was for that amount, we see no reason why it should not be allowed to

to have obtained most of the money to buy the property in question, and that the title was placed in favor of some person. That was the substance of the evidence. It is true, the evidence does not show, although it would not have been difficult for the defendant to show who signed the notes, and who became responsible for the money borrowed from the bank. Nor is it possible to certify that he did not own real estate nor much cash he had with him personally - the building, and that he was unable to remember whether his father signed any of the notes that were given to the Division Street Bank. The testimony of the witness, Mr. Joseph Government, told him that he was going to have his son purchase the building with him; that they went out to buy it together. There are many circumstances in the testimony of the witnesses for the defendant.

It is stated that the property was listed with the plaintiff, and that it was sold, and it may be that the jury, notwithstanding all the evidence, believed that although the title was taken in the name of Joseph, and although Joseph Government testified that he bought it, nevertheless, in reality, the sale was made through the plaintiff, so as to keep Joseph Government, or in reality to his son and estate Joseph, and notwithstanding how much the record shows, to do so. That would be justified in overlooking the testimony given by the jury.

It seems to the defendant plaintiff testified that when he listed the property with the plaintiff, he promised to pay a commission of \$1,000. It was not brought about by the

stand.

Criticism is made as to certain instructions, but we do not find any errors therein sufficient to justify a reversal.

As to the charge that the trial judge made prejudicial remarks to the jury; it is our judgment that the record shows that he tried the case not only with fairness, but with great patience and indulgence.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

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312 - 23639

MARGARET M. MCCARTHY,

Appellant,

v.

WILLIAM J. MCCARTHY,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COON COUNTY.

238 I.A. 618

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The complainant, Margaret M. McCarthy, filed a bill of complaint against her husband William J. McCarthy for separate maintenance. There was a trial, and her bill was dismissed for want of equity. On a writ of error, this court, on March 6, 1920, reversed the decree of dismissal, and the cause was remanded to the Superior Court, with directions to allow the complainant a proper sum for her support and for the maintenance of her children. The mandate was filed in the Superior Court on October 13, 1920, and on July 6, 1921, a decree was entered in the Superior Court ordering the defendant, to pay to the complainant the sum of \$22,795.35, for maintenance, which had accrued since the filing of the bill, together with expenses and solicitors' fees and costs, and, also ordering the complainant to pay her for the maintenance of herself and children, the sum of \$600.00 a month. Upon the defendant filing a bond in the sum of \$30,000.00, an appeal from that decree was prosecuted by the defendant to this court. Pending that appeal,

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the defendant, was ordered, on September 27, 1931, to pay to the complainant as maintenance, the sum of \$600.00 a month. Pending the appeal, the defendant paid the \$600.00 a month up to and including the month of October, 1932.

On June 26, 1932, this court affirmed the decree of the Superior Court and on October 5, 1932, a petition for a writ of certiorari was denied by the Supreme Court. A second mandate was filed in the Superior Court on October 25, 1932.

On February 1, 1933, the complainant recovered judgment in the Municipal Court against William J. Fortune, Catherine Carmody and Virginia Kibbey, sureties on the appeal bond of the defendant, in the sum of \$23,005.81; and subsequently that judgment was paid by William J. Fortune. On March 22, 1933, the complainant obtained a judgment in the sum of \$3,000.00 for monthly charges; and execution was issued thereon. On that judgment there is still due \$2,031.25, with interest; and on September 16, 1933, another judgment was obtained for \$3,600. The latter, also, still remains unpaid.

On August 8, 1933, proceedings in the nature of garnishment were begun against the Chicago Title and Trust Company, Great Lakes Bridge and Dock Company, Matz Motor Livery, Louis E. Hart, and Andrew J. Ryan. On October 15, 1933, the court appointed Perry S. Patterson, Irving Herriott and Joseph A. Graber, sequestrators of the property of the defendant, William J. McCarthy.

On November 8, 1933, the complainant filed a petition in the Superior Court, asking that the Chicago Title and Trust

Company, James J. Jennings, Andrew J. Ryan, Louis E. Hart, and the other members of the firm of Montgomery, Hart and Smith, be directed to appear before the court for examination concerning certain items of the property described in the petition. On November 13, 1933, an order was entered as prayed. In the garnishment proceedings, issues were joined. The Chicago Title and Trust Company answered that it had no property belonging to the defendant. Louis E. Hart answered that he had only certain oil stocks and leases, which he had turned over to the sequestrators, and on which he claimed a lien for legal services; and Andrew J. Ryan answered that he had placed with the Chicago Title and Trust Company \$8,000.00 of bonds as security under an indemnity contract, which was executed to save that company harmless on a guaranty policy.

The trial judge held (1) that the bonds held by the Chicago Title and Trust Company were the property of the defendant, William J. McCarthy, but are rightfully held by that company under an agreement to save it from loss on a guaranty policy issued to one Agnes J. McLaughlin; (2) that Louis E. Hart has no property or assets belonging to the defendant; and ordered that the petition of the complainant as to those respondents be dismissed. This appeal is from that order.

(1) As to the bonds. The bonds involved consist of six Public Service Company Bonds, of the par value of \$1,000 each, and it is claimed by the complainant and petitioner, Margaret H. McCarthy that they are the property of William J. McCarthy, and, as such, should be sequestrated in

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The trial judge held (1) that the contract was voidable at the option of the plaintiff and (2) that the contract was not enforceable against the defendant. The trial judge also held that the contract was not enforceable against the defendant.

1. The first step in the process of identifying a potential security risk is to determine the scope of the risk. This involves identifying the assets that are at risk and the threats that could harm them. Once the scope of the risk is determined, the next step is to assess the likelihood of the risk occurring. This is done by evaluating the vulnerability of the assets and the effectiveness of the controls in place to protect them. Finally, the third step is to develop a plan to mitigate the risk. This plan should outline the actions that will be taken to reduce the likelihood of the risk occurring and the steps that will be taken to respond if the risk does occur.

payment of the judgment in her favor. Dennis McCarthy, the father of William J. McCarthy, by his will, directed that \$300 a year be paid for the support of one Helen Ferguson, who was an inmate of the home of the Little Sisters of the Poor in Chicago. To secure the payment of that sum for the future, \$6,000 in bonds - those here in question - were deposited on April 4, 1921, by William J. McCarthy, pursuant to an order of the Probate Court, with the Chicago Title and Trust Company. The order of the Probate Court provided that on the death of Helen Ferguson the bonds should be delivered to William J. McCarthy, residuary legatee. Shortly after that deposit was made, in May, 1921, Helen Ferguson died. That trust, according to the evidence of the Chicago Title and Trust Company, was closed out on July 7, 1921, although no receipt for the bonds given by William J. McCarthy was produced. Apparently, the last item in the files of the Chicago Title and Trust Company in regard to that trust is a letter from that Company to Andrew J. Ryan, who had acted as attorney for William J. McCarthy, under date of July 7, 1921, remitting to him a check for \$125 on account of interest on the bonds, and stating that the balance of the interest had been retained for charges for trust services.

The evidence shows that on the same day, July 7, 1921, Andrew J. Ryan deposited with the Chicago Title and Trust Company the bonds in question "to constitute a fund under the absolute control of the said Company to indemnify it against loss * * * which it may suffer * * * or to which it may be entitled as guarantor," of lots 8 and 9 in Block 7 in Central Park Addition,

The pledge was given to indemnify the Chicago Title and Trust Company against loss in regard to (1) a suit filed May 5, 1931, in the Circuit Court by Margaret M. McCarthy against Jennings, et al, to declare null and void certain warranty deeds and to establish her dower interest; and (2) claims against the estate of Catherine McCarthy, deceased (mother of William J. McCarthy).

It is urged for the petitioner that the evidence does not show that the bonds in question, after the death of Helen Ferguson, were delivered to the Chicago Title and Trust Company with the authority of William J. McCarthy, who was the residuary legatee under his father's will and at that time entitled to the bonds. Counsel for the petitioner ask, how did the bonds get from the Trust Department of the Chicago Title and Trust Company to the so-called Indemnity Contract Department of the same Company, where they are now held as security to insure the carrying out of the terms of the pledge which was made when they were deposited by Andrew J. Ryan on July 7, 1931?

The chief evidence on that subject lies in the testimony of Andrew J. Ryan, who was attorney for Dennis McCarthy up to the time of his death, and afterwards, in certain matters, also, the attorney for William J. McCarthy. He testified that when the McLaughlin property was sold it was necessary to obtain a guaranty policy and, in order to do so, to make a deposit with the Chicago Title and Trust Company, to secure that Company as to certain matters that might arise in connection with the law suit pending between Mrs. William J. McCarthy and her husband and others. He

says that he discussed them with William J. McCarthy and told him that the only way the property could be conveyed would be by a guaranty policy, and that McCarthy said all right that he would rather give some securities, and asked if the Chicago Title and Trust Company would take the bonds in question; that then he, Ryan, discussed the matter with Mr. Dall of the Chicago Title and Trust Company, and that he said, "Well, we will take your guaranty, Mr. Ryan;" that he Ryan asked McCarthy whether he could let him have those six bonds, or whether he could let him retain them - as he did not recall whether he had them in his possession at that time or not - that the bonds were then deposited with the Chicago Title and Trust Company. He further testified "Mr. Will McCarthy understood very clearly that the bonds were withdrawn by me for the purpose of covering all expenses and charges that might be incurred in connection with that pending suit to indemnify me in the event that I was obliged to pay anything under the guaranty." He further testified that the Ferguson matter was handled by one Jerka, of his firm, and that Jerka got the bonds back, and that they were deposited with the Chicago Title and Trust Company to secure the guaranty policy which had been issued to Mrs. McLaughlin. Andrew J. Ryan testified, on cross-examination, that he deposited the bonds with the Chicago Title and Trust Company the day the guaranty bears date, or at the time he executed the bond, sometime between May 13, 1921 and the date of the death of Helen Ferguson, and July 17, 1921; that the bonds prior to that time had been in the Trust Department of the Chicago Title and Trust Company; that Jerka, of his office, brought the bonds to him and he, the witness, then took them over to the Guaranty Department; that

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sometime in June, 1921, he talked over the matter with William J. McCarthy, and that in talking the matter over with McCarthy, the latter told him to deposit the bonds in question as a part of the indemnity. He further testified that he signed the agreement in the absence of William J. McCarthy, and told him that he used the same bonds as he used in the Ferguson matter. He, also, testified that the bonds belonged to William J. McCarthy, subject to any prior lien the Chicago Title and Trust Company might have thereon, and that he, Ryan, and his firm claimed no interest therein.

The testimony of William J. McCarthy on the subject of the bonds is somewhat vague, although he does state, that he knew that the Chicago Title and Trust Company wanted a guaranty policy, and he presumed that Andrew J. Ryan told him about it, but he could not recall the conversation, and he did not personally know whether Andrew J. Ryan ever actually did sign a bond of indemnity with the Chicago Title and Trust Company; that he himself had never been in the offices of that Company. He further testified that Andrew J. Ryan represented him in the partition suit brought by Agnes McLaughlin.

A representative of the Chicago Title and Trust Company testified, and from his testimony it appears that that Company has no writings showing that William J. McCarthy ever gave Andrew J. Ryan authority to pledge the bonds.

It is quite obvious from the foregoing, that there is no substantial evidence of any kind controverting the testimony of Andrew J. Ryan that the bonds in question were pledged

to the Chicago Title and Trust Company, with the knowledge and approval of William J. McCarthy, who was the owner of them.

It is urged on behalf of Margaret J. McCarthy that there was no reason why the title to Agnes McLaughlin should have been guaranteed by William J. McCarthy, or Andrew J. Ryan for him. We do not think it necessary, however, here to recite and consider the evidence as to the relations between Agnes McLaughlin and William J. McCarthy as those relation may pertain to the title of the former, which title she got through her contract with Dennis McCarthy, the Jennings deed, the partition proceedings, and a Master's deed. We consider that subject as irrelevant.

It is the law generally that statutory garnishment proceedings do not give the creditor any superior right against collateral security in the hands of a pledgee. 13 R.C.L. 781; Galena & C.M.R.R. Co. v. Menzies, 26 Ill. 133. The proceedings here are in the nature of an equitable garnishment, somewhat akin to those based on a creditor's bill, - Siegel Cooper & Co. v. Schueck, 167 Ill. 532.- and as the pledgee, the Chicago Title and Trust Company, properly and rightfully received the bonds in question, it has, as against the petitioner, the right to hold them subject to the terms of the pledge. The question to whom they may actually belong when, if ever, the pledge comes to an end, is not before us. As it is admitted that the bonds upon the termination of the Ferguson trust belonged to William J. McCarthy, and as the evidence quite overwhelmingly shows that they were pledged with his knowledge and authority by Andrew J. Ryan, with the

Chicago Title and Trust Company, it follows that the order of the trial judge that the petition of Margaret McCarthy be dismissed as to the Chicago Title and Trust Company must be affirmed.

As to the claim that Louis E. Hart, or his firm has any property belonging to the defendant. The only item here involved is a promissory note for \$20,362.97, on which certain payments and credits have been made. Apparently, since the beginning of the litigation of which these proceedings are a part, in 1917, Montgomery, Hart & Smith, chiefly through Mr. Louis E. Hart, have been solicitors for William J. McCarthy. At the time the original bill of complaint was filed by Margaret M. McCarthy, her husband, William J. McCarthy, was the chief owner of a funeral service business, which was conducted under the name of the Matz Motor Livery. In the summer of 1921, about the time the final decree was entered in favor of the complainant and against the defendant, William J. McCarthy, on July 1, 1921, he ~~transferred~~ sold to one Richard L. McConnell, who had acted as court reporter in the litigation above referred to, his, McCarthy's interest in the business of the Matz Motor Livery. The business of that Company consisted of renting cars to individuals, or funeral directors for funerals. The cars were not owned by the Company. Originally McCarthy owned practically all the cars and hearses and leased them to the Company, and in the course of time his associate, one Johns, purchased from McCarthy several of these cars, the rest, consisting of three hearses and five limousines, were owned by McCarthy, and he received from the Matz Motor Livery \$75.00 per month a

Chicago Title and Trust Company, is advised that the order
of the trial judge that the retention of Chicago Title and
Trust Company be to the Chicago Title and Trust Company and
be retained.

As to the claim that James E. Davis, or his firm has
any property belonging to the defendant, the only item here
mentioned is a promissory note for \$25,000.00, on which
certain payments and credits have been made. Apparently
since the beginning of the litigation of this issue pro-
ceedings were made, in 1911, promissory, that is, which
if through J. Davis E. Davis, have been retained for litigation
J. Davis, as the date the original bill of complaint was
filed by defendant J. Davis, our husband, all Jan 3.
Hodgson, was the date owner of a personal service business,
which was conducted under the name of the Lake Shore Hotel.
It was in 1911, when the first bill of complaint was
filed in 1911, at the time the first bill of complaint was
filed J. Davis, or his firm, retained J. Davis, who was
then retained J. Davis, who was then as a court appointed
the litigation about retained J. Davis, J. Davis's business
in the business at the Chicago Title and Trust Company
first company retained J. Davis, who was then as a court
retained J. Davis for J. Davis. The only item not owned
by the company. Apparently J. Davis was personally all
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car. He owned, also, the lease on the premises in which the business was conducted. The sale to McConnell was concluded about July 21, 1921. McConnell paid in cash the sum of \$10,000, less a stenographer's charge, which he had made against McCarthy for stenographic services in the litigation. In addition, McConnell executed the note in question, which was for \$20,362.97. It was dated July 1, 1921, and payable on or before two years after date. The payee was William J. McCarthy. In the transaction, the note purported to represent the excess of the assets over the liabilities of the Company, the amount being arrived at by deducting the accounts payable from the total of the accounts receivable and cash on hand and in bank. McCarthy turned over to McConnell all his stock in the Company, the lease and gave a bill of sale for the cars which he, McCarthy then owned. McConnell became President of the Company, and Mr. Hart, to whom one share of stock was transferred by McConnell, became Secretary.

The note bore endorsement as follows: "It is understood that a part of the consideration of the within note is the undertaking upon the part of William J. McCarthy, the payee, to guarantee the payment in full of the accounts receivable of Mats Motor Livery Co. as of June 30, 1921." At the time McConnell gave the note in question, he acquired, as a part of the transaction, open accounts of the Mats Motor Livery, aggregating about \$20,602.98. The assets of the Mats Motor Livery were made up largely of open accounts against customers to whom motor livery service had been furnished. The value of the open accounts which were trans-

ferred by McCarthy to McConnell depended largely upon the value of the accounts receivable of the Mats Motor Livery. On July 21, 1931, which was the date of the note to McCarthy, these accounts receivable aggregated \$19,740.05, and, so as to assure McConnell, the purchaser, that the Mats Motor Livery would receive the full amount of these accounts receivable, so that it in turn, could pay its account with McCarthy which had been assigned to McConnell, the endorsement above mentioned guaranteeing the accounts was made upon the back of the note. Payments and credits on the note were made as follows: November 18, 1931, paid \$1,000; May 8, 1932, paid \$2,000; August 21, 1932, paid \$500; November 1, 1932, allowance on account of discount on accounts, \$1,716.00; February 14, 1932, paid \$500; March 1, 1933, paid \$312.31; May 25, 1933, paid \$40.70; and May 3, 1933, paid \$20.90. Exactly what additional discounts or allowances upon the remaining accounts due to the Mats Motor Livery may be necessary, the evidence does not show. The evidence shows that a large part of the accounts of the Mats Motor Livery have been collected, and that some of these outstanding are probably uncollectible. Mr. Hart testified, and there is no countervailing evidence, that at the time his firm took the note, he did not consider it worth \$10,000. The evidence of Mr. Hart is, that in October, 1932, he visited William J. McCarthy in Pittsburg, and was informed that he was without means; that shortly after that, McCarthy wrote offering to turn over to him the McConnell note, in payment of the Montgomery, Hart & Smith account, if it was acceptable. On November 4, 1932, that firm wrote to McCarthy as

follows: "In view of the fact that we understand that you are at the present time unable to pay our bill for disbursements and services, on which there is a balance due us of \$9,217.58, we will, if agreeable to you, accept the note of Richard S. McConnell, dated July 1, 1931, to your order, payable on or before two years after date, for the sum of \$20,362.97. We understand that there has been paid on account of this note \$3,500.00; that \$1,700.18 credit has already been allowed on accounts guaranteed by you, that there will be further credits or allowances against said note, which will reduce the same to somewhere in the neighborhood of \$10,000.00." Written on that letter and signed by William J. McCarthy, are the words, "I assent to and accept the above." Following that, the note was endorsed by McCarthy and delivered to Montgomery, Hart & Smith, and the account of McCarthy closed on the firm's books, McCarthy being credited with \$9,217.58. When McCarthy was asked if he was satisfied with the arrangement he made with Mr. Hart; that is, to give him the note in payment of his bill, he answered, "Yes, sir, I was perfectly satisfied."

Some criticism is made by counsel for the petitioner, Margaret McCarthy, of the amount charged for legal services, but we do not find any evidence whatever tending in any way to show that they were worth less than was charged. Apparently, it is urged that the note in question should have been ordered turned over to the sequestrators, and that all the creditors of William J. McCarthy who are interested in these proceedings, his solicitors included, should participate in the result. We do not think there is any ground for such a claim. The

evidence convincingly shows that the note in question, which was originally the property of William J. McCarthy, was, for a valuable consideration, and with full knowledge of the facts, voluntarily given to his solicitors in settlement of certain reasonable charges for services, and there is no evidence whatever but that the whole transaction was bona fide and for sufficient mutual consideration. There is nothing in the law which prevents a solicitor from making a fair contract with his client. If it were shown that McCarthy's solicitors conspired with him to take from his estate property which ought to have been retained and used for the payment of his obligations to his wife, it would be different; but there is not a scintilla of evidence to that effect. As all the evidence here shows that the transaction was entirely proper, it follows that the petitioner is not entitled to have the note turned over to the sequestrators. The order of the trial judge, therefore, that the petition of Margaret McCarthy be dismissed as to Louis E. Hart and his firm, must be affirmed.

The order will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMPSON, J. CONCUR.

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• *Journal of the American Medical Association*

• *Journal of Management Education* 24(1) 1999

227 - 29644

4558a

DAVID R. STEFFEY, doing business
as STEFFEY BROS.,

Appellant,

v.

OTTO KRUG,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 618³

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

This is an action of the fourth class, brought
by the plaintiff, David R. Steffey, doing business as Steffey
Bros., against the defendant Otto Krug, for \$166.23. There
was a trial, without a jury, and a judgment for the defend-
ant. This appeal is therefrom.

The evidence showed the following; that in February,
1923, the plaintiff, who conducted a commission business on
South Water Street, employed the defendant as manager of his
meat department, and promised to pay the defendant for his
services one third of the profits, all expenses to be paid
by the plaintiff; that the defendant, pursuant to that pro-
mise, went to work about February 1, and worked until June
16, 1923, when he quit; that he, the defendant, received
his share of the profits for February, which was \$275.76,
and for March, which was \$301.63; that in April, May and
June he drew, in the absence of the plaintiff, various sums,
amounting to \$575.00, which was \$166.23 more than one-third
of the profits.

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1. *Journal of the American Medical Association*, 1990; 263: 1001-1005.

(continued)

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Source: U.S. Census Bureau, *U.S. Census of the Population, 1980*, vol. 1, PC80-1, table 1-10.

—Après un bref passage à la messe, nous sommes allés à la messe.

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NOT TO BE USED IN PRESENTING APT. HOURS, 1994-1995, 1996-1997

528 • J. Neurosci., April 24, 2008 • 28(16):525–533

There are at least two other reasons why the above may be misleading:

BY THE REGISTRAR: _____

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 09-10-2001 BY 60322 UCBAW

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible][illegible]

The only question in the case is whether the plaintiff is entitled to recover that back. The defendant testified that the coolers used in the business were not properly taken care of, and were out of order, and a great deal of meat spoiled, and that if he could have sold that meat his profits would have been \$122.70 more. For the latter sum, the defendant filed a set-off.

With the record as it is, we see no reason why the plaintiff is not entitled to recover. The case is one of the fourth class, and the evidence simply and unequivocally shows that the defendant drew \$166.22 in excess of what he was entitled to under his contract. It was a unilateral contract; and as he rendered services, and profits were made, he was entitled to one third of them; and when he drew money, as he did, through the plaintiff's cashier, in excess of one third of the profits, he became a debtor to the plaintiff to that extent.

As the record does not show a word of evidence to the contrary, the judgment will be reversed and judgment entered here in favor of the plaintiff and against the defendant in the sum of \$166.22.

JUDGMENT REVERSED AND JUDGMENT HEREIN.

O'CONNOR, P.J. AND THOMPSON, J. CONCUR.

238 - 39658

4559a

MRS. E. HENDRICKS,

Appellee,

v.

JAKE GOLDSTEIN and A. BECKER,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 618⁴

Opinion filed June 17, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On January 8, 1924, the plaintiff, Mrs. E. Hendricks, obtained judgment by confession, in the Municipal Court, in the sum of \$770.00 on five promissory notes.

On January 24, 1924, on motion and affidavit for the defendants, the judgment was opened, and leave given to the defendants to make a defense; the judgment to stand as security, and execution to be stayed until the further order of the court. There was a trial before the court, with a jury, and on March 20, 1924, the trial judge instructed the jury to return a verdict to the effect that there was due from the defendants to the plaintiff the sum of \$770.00. A verdict was rendered accordingly, and an order then entered that the judgment rendered against the defendants by confession stand confirmed as the judgment of the court, and that execution issue thereon. This appeal is from that judgment.

The statement of claim recites that the plaintiff's claim is for money due on five certain promissory notes exe-

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cuted by the defendants for the sum of \$125.00 each, dated April 20, 1922, payable to the order of the 16th St. State Bank, a corporation, twelve, thirteen, fourteen, fifteen and sixteen months, respectively after date, "which promissory notes were endorsed by the said 16th St. Bank and negotiated and delivered to the plaintiff, who is the legal owner thereof;" that there is due on said promissory notes the sum of \$625.00, with interest from April 20, 1922, and an attorney's fee of \$100.00.

The affidavit of execution of the note and of plaintiff's claim, sets up that the total amount due, exclusive of attorney's fees, is \$670.00; also, that the signatures of Goldstein and Becker to the notes in question are genuine.

The affidavit of the defendant Goldstein, which was made for the purpose of opening up the judgment by confession, alleges that the plaintiff is not a bona fide holder for value without notice; that the endorsement appearing upon said notes is not the endorsement of the 16th St. State Bank; that S. W. Maltz, who purports to sign as president of the bank, was not president after June, 1922, and that the bank had discontinued doing business since March 20, 1922; that the notes sued upon are a series given by the defendants to Maltz while he was president of the bank, for the purpose of obtaining a loan from the bank; that said loan never was obtained, and the defendants never received any money or valuable consideration from the bank for said notes; that the plaintiff is holding the notes as the agent of Maltz, and not in her own right; that the plaintiff did not receive the notes from the bank in due

course of negotiation, but that the notes first came into the possession of the bank on March 23, 1923, at which time they were placed with the bank by Maltz as agent of the plaintiff as collateral to secure a note due to the bank from the plaintiff; that the representations made to the bank at that time were that the defendants had signed the notes for the accommodation of the plaintiff. That the notes sued upon were returned unendorsed by the bank to Maltz as agent for the plaintiff, on May 31, and June 18, 1923, and that the endorsements appearing on said notes were placed thereon subsequent to those dates; that the defendants are not indebted to the 16th St. Bank in any sum whatever on said notes.

The defendants filed no plea, taking issue with the allegations in the statement of claim.

At the trial, the plaintiff testified, and offered in evidence the five promissory notes, and rested.

For the defendants, Maltz, former president of the 16th Street State Bank, and one Kalis, former cashier of that bank, testified. Each of the five notes was for \$125.00, and dated April 20, 1922. They were payable, respectively, twelve, thirteen, fourteen, fifteen and sixteen months after date. Each recites that it is payable "to the order of the 16th St. State Bank;" and on the back of each appears the endorsement, "16th St. State Bank, S. W. Maltz, Pres." The notes are all signed Jake Goldstein and A. Becker.

The evidence of the plaintiff is to the following effect; that she is a married woman, resides at 3225 Helden Avenue, and is living with her husband; that she has known

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Samuel W. Maltz, through doing business with him, for about ten years; that on April 25, 1922, at his office, he told her that he had a mortgage of Goldstein and Becker; that it was a very good one, and that he had it ready for her; he told her the amount of the notes he had already for her was \$4225.00; that she then purchased them and paid him that amount of money for, altogether, 30 notes; that when she purchased them, she left them with him for collection; that the notes in question have not been paid; that the signatures thereto are those of the defendants.

On cross-examination, she testified that the first time she got possession of the notes, subsequent to the time that she left them with Maltz for collection, was in December of 1923, or January of 1924; that at the time she got them back, she got them from Maltz. She was asked whether at the time she first got the notes from Maltz the endorsement which now appears on the back of them was there, and she answered that she could not remember when it was put on; that she did not know when it was first put on the notes.

The evidence of Maltz, called as a witness on behalf of the defendants, is to the following effect: that he was president of the 16th St. State Bank from February 19, 1919, until July 19, 1922; that he first saw the notes in question when he made the loan on April 20, 1922; that he sold them to the plaintiff, and she paid him for the notes, and he turned the notes over to her; that he then gave her a receipt in the form of a statement and kept the notes in the bank for collection; that when the notes were paid - meaning some of the 30 -

she was given credit in her account; that he sold the notes to her about April 20, 1922, on his own behalf; that he "was the legal owner of the notes and I sold them to Mrs. Hendricks. I paid Mr. Goldstein for these notes;" that the last time he saw the notes was in the latter part of 1923, when he got them from Kalis, former cashier of the bank.

The evidence of the witness Kalis, cashier of the bank from February, 1919, to March 20, 1923 - called by the defendants - is to the following effect: that he first saw the notes in question between March 10 and 20, 1923; that at that time there was no endorsement on the back of the notes; that the notes were in the possession of the bank from March 10 or 20th to June 18, 1923, when the notes were given over to the plaintiff; that the notes were not purchased by the plaintiff from the bank; that he was cashier of the bank on March 20, 1923, the date of the notes.

On cross-examination, when asked if he knew of his own knowledge from whom she bought the notes, he answered, "Yes, sir, she bought them from Maltz." He further testified that the 16th St. State Bank did not receive any money from the plaintiff for these notes at any time.

It appears, therefore, from the testimony, not only of the plaintiff, but from that of Maltz and Kalis, called by the defendants, that the plaintiff bought the notes in question from Maltz. It also appears that when she bought the original thirty notes, five of which are here being sued upon, she paid Maltz therefor, the sum of \$4225.00. While

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the one, then, which is the subject of the present inquiry, and the other, which is the subject of the inquiry in the next section. The first of these is the subject of the present inquiry, and the second is the subject of the inquiry in the next section. The first of these is the subject of the present inquiry, and the second is the subject of the inquiry in the next section.

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there is no evidence introduced on behalf of the defendants that even tends to show that the plaintiff was not entitled to the notes in question, and was not the owner thereof, yet it seems to be contended in some way, perhaps as set forth in the defendant Goldstein's affidavit, that the notes sued upon are a part of the series given by the defendants to Maltz while he was president of the bank, for the purpose of obtaining a loan therefrom, and that the loan never was obtained, and the defendants never received any money or valuable consideration from the bank for the notes, and that the plaintiff did not receive the notes from the bank in due course of negotiation.

In the course of the trial, counsel for the defendants, undertook to make considerable of the question as to the endorsements upon the backs of the notes and when they were made; but admitting, as we must, that the evidence shows that there is no substantial controversy that the plaintiff got the notes from Maltz and paid him for them, and that he was the owner of the notes, as he testified, when he sold them to her, and that nothing has been paid on them, it follows that the plaintiff made out a cause of action, and that the defendants failed in any way to overcome it.

It must be borne in mind that the endorser, the bank, was not making a defense, and is not even a party. Counsel urge that although it is admitted that by the Negotiable Instruments Act the holder of a note is deemed prima facie to be a holder in due course, nevertheless, that may be rebutted, and evidence tending to show that the endorsement was unauthorized, was admissible. We do not find, how-

ever, that the record shows anywhere that any proffer of evidence was made on the part of the defendants on that subject. Under the circumstances, in our opinion, the contention for the defendants in regard to the endorsement, is without merit.

Inasmuch as the evidence shows that Malts, as he testified, paid Goldstein for the notes, and as the evidence shows that he was the legal owner of them; that he sold them to the plaintiff; that she paid him for them, the matter of the endorsement in the name of the payee - the suit being by a subsequent holder against the makers - becomes immaterial. It was held in Union Brewing Co. v. Interstate Bank, 240 Ill. 454, that it is the actual transfer for value which substantially passes the property in the note, and that the endorsement is merely a formality. See also Selover on Negotiable Instruments, 2nd Ed. 162.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

15600

MINNIE KLUGE,

Plaintiff in Error,

v.

OTTILIA SOENS, MARGARET MOERIS and
PETER SOENS, as defendants in lieu
of JOSEPH SOENS, Deceased,

Defendants in Error.)

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 618⁵

Opinion filed June 17, 1925.

MR. JUSTICE THOMPSON delivered the opinion of
the court.

The plaintiff, Minnie Kluge, brought this action at law against the defendant, Soens, alleging in her amended declaration that he was the keeper of a dram-shop in the City of Chicago, in January 1922, and had been for a long time prior thereto, and that he had sold and given whiskey, beer, wine and other intoxicating liquors at and prior to that time, to her husband, Carl Kluge, who had been a skilled painter and interior decorator, with an income of \$3,000 per year. She further alleged that as a result of the intoxicating liquors supplied to her husband by the defendant, her husband "became and was intoxicated, and being so intoxicated, and on account of and in consequence of such intoxication," he became sick and his lungs became affected and he became afflicted with consumption, by reason whereof he became disabled and incapacitated and unable to attend to his occupation and employment," and in consequence of such habitual intoxication became greatly impoverished, reduced, degraded, and wholly ruined, as well in mind and body as in his estate," and that he was obliged to secure

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treatment at various hospitals and pay out large sums of money "in and about endeavoring to be cured from said disease, contracted as aforesaid." The plaintiff further alleged in her amended declaration that by reason of her husband's said intoxication and illness, he neglected and ceased to attend to his business or in any manner earn or provide a livelihood for himself or the plaintiff, by means of which the plaintiff became and was injured in her means of support, wherefore, she alleged she had sustained damages to the amount of \$10,000, "and by force of the statute in such case, made and provided, an action has accrued to her to demand and have of the defendant, that sum of money, and therefore she brings her suit."

By another count in her amended declaration she made similar allegations and in addition, she alleged that during the period complained of she had instructed and cautioned the defendant to refrain from selling and giving her husband intoxicating liquors, but, notwithstanding this, the defendant did continue to supply her husband with intoxicants. A third count was similar to the first in its allegations.

To this amended declaration, the defendant filed a general and special demurrer, and for cause of special demurrer he set up "that the plaintiff seeks to recover in each count of the said declaration for habitual intoxication, when no such right exists; and also, that each count of the said declaration is in other respects, uncertain, informal and insufficient."

Section 20 of the Prohibition Act of this State, passed in 1921, (Cahill's Ill. Sts. ch. 43, Par. 20) contains the substance of the provisions of section 9 of the Dramshop

Act of 1874, (Cahill's Ill. Sts. ch. 43, par. 74 (10).)

It provides that "Any person who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, whether resulting in death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in such action such person shall have a right to recover actual and exemplary damages." It would seem to be quite clear that this section of the statute gives a right of action against one who by unlawfully selling to or assisting in procuring liquor for an intoxicated person from another, causes the intoxication of that other, and by reason of such intoxication the plaintiff claims to be injured "in person, property, means of support or otherwise," and that this is the case, whether the intoxication comes to be habitual or not.

In our opinion, the cause of special demurrer raised by the defendant did not exist, and we are further of the opinion that in other respects the amended declaration of the plaintiff stated a good cause of action.

For the reasons stated, the judgment of the Superior Court is reversed and the cause is remanded to that court with directions to overrule the defendant's demurrer and for further proceedings.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

42 - 22445

KAROLINA PULNAR,
Appellee,

v.

JOHN ZAWIERUCHA, et al,
On appeal of ANIELA ZAWIERUCHA,
Appellant.

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APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

238 I.A. 619

Opinion filed June 17, 1935.

MR. JUSTICE THOMSON delivered the opinion of
the court.

By this appeal the defendant, Aniela Zawierucha, seeks to reverse a decree for specific performance of a contract under which she and the other defendant, her husband, had agreed to sell a certain piece of property they owned, to the complainant, Karolina Pulnar. The contract in question recited in substance that Frank Pulnar and Karolina Pulnar, his wife, agreed to purchase the property in question at the price of \$19,475.00, and that "said Zawieruchas agree to sell said premises at said price and to convey said real estate by warranty deed." This contract was never executed by Frank Pulnar, the complainant's husband, but it was executed by the complainant and by both defendants. The defendant, Aniela Zawierucha, refused to join with her husband in executing the deed to the property to the complainant, whereupon the latter filed this bill for specific performance of the contract to sell.

It is first contended by the defendant in support of her appeal that the contract is unenforceable, inasmuch

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as it lacks mutuality, by reason of the fact that although the contract recites that Frank Pulnar and Karolina Pulnar agree to purchase it was executed only by Karolina Pulnar. In our opinion, this point is not tenable. Although the body of the contract included Frank Pulnar as one of the purchasing parties, it was not necessary that he execute the contract in order to complete the obligation of the defendants to convey the property in accordance with the terms of the contract, it having been duly executed by Karolina Pulnar, the other purchaser named in the contract, and it having been duly delivered without any conditions, so far as the record discloses. Brailing v. Hybl, 167 Ill. App. 165.

It is further contended in support of the appeal that the Chancellor erred in entering the decree appealed from because the evidence shows that the defendant Aniela Zawierucha signed the contract under duress and in fear of bodily injury threatened by her husband, if she refused to sign, all of which is alleged to have been known by the complainant at the time the contract was executed.

The evidence on this question is in sharp conflict. The contract was executed in the presence of all of the parties named in it and also three or four real estate men alleged to have been representing the respective parties to the contract. One of these real estate men, Makowski, maintained his real estate office in one or two front rooms at his home, and the contract was executed there. One of these two rooms apparently opened through a doorway into the kitchen of the Makowski family, and at the time the contract

was drawn up and executed, Mrs. Makowski was in the kitchen, busy in the performance of certain of her household duties. She was called as a witness by the defendant and testified as to the various parties who were present in the office in the front part of her home on the occasion in question. She also testified that the defendant Aniela Zawierucha "got very excited" during the conversation which took place while the contract was being prepared and that on three different occasions she came into the kitchen and spoke to the witnesses, asking her "what they could do if she didn't sign the contract," and on another occasion asking her whether her husband could do anything to her if she didn't sign the contract; and on the third occasion asking, "Could I run away and could they do anything to me if I did, either my husband or those people?" This witness further testified that she heard the defendant John Zawierucha call his wife and she also heard Mr. Kraus, who was drafting the contract, call her and also the real estate agents, - "They asked her to come and sign the contract; that is all I can say." On cross-examination this witness was asked whether she heard anybody threaten Aniela Zawierucha with physical violence, and she answered, "Well, her husband was asking her to sign this contract and also the agent Mr. Wilka. I did not hear her husband threaten to shoot her in my house that night; I could not say that anyone threatened her with any physical violence that evening."

It appears from the evidence that the defendants were making payments on a second mortgage on their property and that Makowski had represented them in some capacity with regard to that second mortgage, and that frequently they went

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It is noted that the subject has been identified as a person who is a member of the same family as the person who is the subject of the investigation.

to his office for the purpose of making the payments on it and he also took care of their tax payments. The defendant Aniela Zawierucha testified that on the day this contract was entered into she had occasion to go to Makowski's office to get certain receipts in connection with the payments that had been made on the second mortgage and also to make some inquiries as to whether the taxes had been paid; that no one who was present in the office that day was representing her; that while she was there, Kraus came in and afterward the complainant, Mrs. Pulnar and two real estate agents, and also that her husband came in shortly before Mrs. Pulnar and the agents arrived. The agents referred to were Wilks and Swick. She was asked whether or not she had ever had a conversation with them prior to the day the contract was entered into and she answered, "I was running away from them." She was then asked whether or not she had any conversation about the sale of the property, with anybody on the day the contract was entered into and she answered, "They told me if I have that for sale, and I said 'no.' I never had it and they could not get it for sale." She testified that she had quarreled with her husband about selling the property; that he wanted to sell it and she did not; that he had recently come from the hospital and wanted to sell the property and go back to the old country, but that she did not want to sell it; that the contract in question was never read or explained to her either in Polish or in English and that she never knew the contents of it before she placed her signature to it; she had no conversation either with the complainant or Mr. Kraus, who drew up the contract or any of the real estate agents, with reference to selling the property; and that

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when she put her name to the contract she did not know what she was signing. At this point in her examination the Master who was hearing the testimony asked her why she signed the contract and she answered, "I signed it because my husband threatened me; he said he is going to kill me and I tried to run away, but he made me to sign. I didn't want to sign it." She was then asked by her counsel whether "this conversation" was in the presence of all the other parties and she answered, "Yes, loud in the presence of all." On cross-examination she testified that she had never listed this property with anybody for sale and that Sakowski did not represent her and her husband in this transaction, and she did not know who he represented.

Two other witnesses were called by the defendant and testified. One, Mary Tatarosyk, testified that she had heard a conversation between Mrs. Pulnar and Mrs. Zawierucha, after the contract had been executed, in which Mrs. Zawierucha said she did not want to give up that property; that she never wanted to; and Mrs. Pulnar said, "I will give up that willingly but Mr. Kraus would not let me do it;" that Mrs. Zawierucha stated that she did not want to sell the property, but that she was forced to do so by her husband who wanted to go to the old country, "and she got crazy and signed it." The other witness, Katy Alfons, testified she went to the home of the complainant with Mrs. Zawierucha, after this suit was started, and heard her ask the complainant, "Why do you sue me, I am not selling that house;" and Mrs. Pulnar replied, "I would back out but I leave everything in Mr. Kraus' hands."

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that the one signed, at this point to have been made in
the hands of the person the testimony which was not
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and I tried to say that, but he would not say. I finally
was to sign it. The man then asked by the counsel whether
"this contract" was in the possession of all the other
parties and the answer, "Yes, I am in possession of it."
In this connection the testified that she had never signed
this property with anyone but she was the person who was
represented by her and her husband in this transaction, and she
did not know who he was.

The other witnesses were called by the defendant
and testified. Now, Mary Thompson testified that she had
been a companion between a man, Robert and Mrs. Thompson,
after the husband had been married, in which Mrs. Thompson
said she did not work in that in her company and she never
heard of any money being paid to her by any of the parties
but Mr. Thompson would not say in 1911 that Mrs. Thompson
knew that the man was to pay the company, and she
was asked to do so by the husband who wanted to go to the city
country. "I never got paid and signed it." The other witness,
Mary Adams, testified she went to the home of the defendant
and Mrs. Thompson, after that was started and heard
her say the defendant, "Why do you not say I am not willing
that money," and Mrs. Adams testified, "I was told that the
money was paid to Mr. Thompson."

In the first instance, the defendants defaulted in this case, and the matter was referred to a master for the purpose of having the complainant prove up her case and at that time she testified to the execution of the contract and to the payment of certain earnest money to Makowski, who, she said, was acting as attorney for the purchasers. She also testified that she was ready to complete the purchase and had tendered the balance of the purchase price, in the presence of both the defendants but that the defendant, Aniela Zawierucha said she didn't want to look at the money. Kraus testified to the effect that he drew up the contract and saw the defendants sign it; that he had never known them before; and that about a month later he saw the defendant, Aniela Zawierucha and said they wanted to close the deal and she refused to talk to him; that later he sent someone over to see what the matter was, and this person was told by the defendants that they would not complete the contract.

After the master had made a report, the order of default which had been made was vacated as to the defendant, Aniela Zawierucha, and she proceeded to submit testimony in defense of the suit, as above outlined. The complainant then submitted further proof. Makowski testified that he had represented the defendants in connection with their original purchase of the property; that he heard the two defendants converse with one another about the selling of the property at the time the contract was prepared and they executed it; that he saw the defendant sign the contract and that her husband was present at the time. He was asked whether any threats were made by anybody against Aniela Zawierucha, or whether

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language and by individuals and not individualistic and self-serving.

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and the following information:

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anybody threatened to shoot her or use any bodily violence against her, and he answered "No, I didn't hear them." He further testified that Mrs. Zawierucha came to his house that day alone, and either at that time or later he gave her some tax and interest receipts, and he testified further that she went out "and afterwards she came back with her husband and the other people." He was asked when he represented in connection with the execution of the contract in question, and he said he didn't know, - "I was sitting at the table, I was just representing them at that time because they came and I was doing business; I thought that I would represent them." He testified further that Kraus drew up the contract in the presence of all of them and when it came to inserting the purchase price he asked both Mrs. Zawierucha and the others whether \$12,475 was the correct price, but that he did not remember just what their reply was. He also testified that the other particulars set forth in the contract had been suggested by him, and that as he asked the parties to the contract about them, they said, "All right." He testified that he did not read the contract to the others but that Kraus did read it in Polish. On cross-examination this witness was asked whether Mrs. Zawierucha said anything to him about selling her real estate and he answered that she did not, - "She told me that there was some agent that was trying to sell her property but she would not do it." He testified that he saw "these women, apparently referring to both Mrs. Zawierucha and Mrs. Pulnar, go into the kitchen and talk with his wife several times while the contract was being drawn up, but that he did not know what they were talking about.

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, stuffy interior. I looked up at the building, a grand structure with many windows, some of which were already lit. A few people were walking on the sidewalk, some in coats, others in sweaters. I felt a bit out of place, but I tried to ignore it. I walked towards the entrance, my eyes scanning the area. A man in a suit and tie was talking to a woman in a dress. They seemed to be in a hurry. I walked past them, my heart pounding. I reached the door, opened it, and stepped inside. The interior was dimly lit, with a few people standing in the background. I looked around, trying to find a familiar face. I saw a man in a suit and tie, a woman in a dress, and a man in a uniform. I felt a bit lost, but I tried to stay calm. I walked towards the man in the uniform, who was standing near the entrance. He looked at me and smiled. "Welcome," he said. "What can I do for you?" I looked at him and smiled back. "I'm new here," I said. "I'm looking for a room." He nodded and led me to a room. The room was small, but it was clean and comfortable. I took a shower, got dressed, and went to bed. I fell asleep quickly, my mind racing with thoughts of the future.

Wilks testified that he first saw Mrs. Zawierucha and her husband, the two defendants, at their house; that she had listed the property for sale in his office, and he then went over to the house and saw them and asked them if they wanted to sell, as the listing had apparently been with his clerk and that she said when he called to see her, "Yes, I need money; my husband is in the hospital." He further testified that she told him again on a later occasion that she wanted to sell, and that still later, he visited the property with the complainant and her husband, and showed them the building, and that he asked when the defendants wanted to execute the contract and that Mrs. Zawierucha said she would do so the following day; that she didn't want to go anywhere except to Mr. Makowski because he represented her every time she bought a new building. He further testified that all the parties in interest met at Makowski's office and the contract was prepared and executed, and that at that time he did not hear Mrs. Zawierucha or her husband say anything, and that the former said nothing about being forced to sign the contract. This witness further testified that he found Mrs. Zawierucha at the office of Makowski when he got there, upon the occasion in question, and that her husband did not come until about a half hour later. This witness testified that he would be entitled to a commission on the sale if it went through; that he visited the property of the defendants on two different occasions before he took the Fulmars there^{look at}/at it; that Mrs. Zawierucha said she wanted to sell it; that on the last occasion he visited the property he remained an hour or two and they discussed "how much the building brings, taxes and everything."

The other real estate man, Swick, a partner with Wilks, testified to about the same facts as Wilks did. He further testified that at the time the contract was drawn up, Makowski represented the defendants and that he explained the contents of the contract to them, reading it to them in Polish. He said he saw the two defendants talking but did not know what they were talking about.

Another witness for the complainant, Apolinia Mazusky, testified that on the day before this contract was signed she went with Mrs. Pulnar to the defendants' home and saw the house and that on that occasion Mrs. Zawierucha said she would not make a contract that night but would the next day, and this witness also testified that on the following day she went with the complainant to Makowski's office. She testified that Mr. Kraus prepared the contract but that she did not hear him ask anybody any questions and that after the contract had been written up, Kraus read it to Mrs. Zawierucha in the Polish language and thereafter she signed it without saying anything; that Mr. Zawierucha asked Mr. Makowski if everything was all right and the latter assured him that it was. She testified that she did not hear any conversation between the defendants and that Mrs. Zawierucha was in the room all the time the contract was being prepared and her husband was also; that she did not see the defendant go back into the Makowski kitchen.

Kraus testified again saying that he was called to Makowski's office, on the day this contract was prepared and signed, by Makowski; that when he reached the office he

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a blanket, wrapping around me and filling my lungs. I took a deep breath, savoring the scent of pine and the distant sound of water. The world seemed so quiet, so still, as if time had stopped for just a moment. I looked up at the sky, where a few stars were beginning to peek through the darkening clouds. The night was young, and the moon was just starting to rise, casting a soft, silvery glow over the landscape. I felt a sense of peace and wonder, knowing that I was in a place where the beauty of nature was truly on display.

talked with both Mrs. Pulnar and the defendant and the latter said she was the seller of the property and that Makowski represented her. He testified that he did not see the defendant go into the kitchen, and that she did not discuss the various terms of this contract with him, but she did with Makowski, and he testified that he also discussed them with Makowski. He testified that Mrs. Zawierucha told him she was selling the property for \$19,475; that she was present all the time he was preparing the contract and that when she signed she said nothing. He testified he heard no loud talking or any threats; that after the contract was prepared he showed it to Makowski and he looked it over and made one or two suggestions which were incorporated, and that the witness then read the contract in Polish to all of the parties, and the contract was executed. He testified that in doing what he did, he was representing the Pulnar's.

The defendant, Aniela Zawierucha was again called to the stand and denied that she had ever listed the property with any agents and that she had gone to the office of Swick & Wilks, as they testified. She also denied telling anybody that her property was for sale. On this point she testified; "First there came Swick and then about two weeks afterwards with Mrs. Pulnar and I told him right that evening that I have no house for sale; I am not willing to sell and I will not." She also denied telling Kraus, on the day the contract was signed, that she wanted to close the deal for the sale of her property.

After hearing this contradictory testimony, the Master submitted his report, finding that the defendant Aniela Zawierucha had executed the contract of her own free will, with knowledge of its terms and conditions and that she was subjected to no duress and that no threats had been made to procure her signature to the contract, either by her husband or anybody else. Objections were filed to this report and after they were overruled they were allowed to stand as exceptions and these were overruled by the Chancellor and the decree appealed from was then entered. In our opinion, it would be quite impossible, on this record, for this court to say that the findings made by the Master and the decree entered by the Chancellor, were so manifestly against the weight of the evidence as to permit us to disturb the decree.

The Master, who saw these witnesses, apparently believed those testifying for the complainant rather than those appearing for the defendant. It is true that the three witnesses called by the defendant probably had no interest in the outcome of the case, while admittedly two or three of those called by the complainant did have some interest, in that they would be entitled to some commission if the sale went through.

There are some features of the defendant's case which tend to weaken her position. As Mrs. Makowski was working in the kitchen, under all the evidence she was not more than 8 or 8 feet away from the room in which all these parties were at the time this contract was being

prepared and signed. The defendant maintains that she got into a controversy with her husband at the Makowski home about signing this contract and the threats of which she complains and which she contends had the effect of coercing her into signing the contract, were made in a loud voice in the presence of everybody, and yet her own witness, Mrs. Makowski, fails to corroborate her in that respect and says that although she heard her husband and some of the others call her into the room to sign the contract, she did not hear any threats. There is a rather glaring inconsistency in the position taken by the defendant in support of her appeal from the decree for specific performance. In one breath she testifies that the only reason she signed this contract was that she and her husband quarreled about it,- he wanting to sell the property and she opposing it,- and he subjected her to such threats as to coerce her into signing it against her will; and in the next breath she takes the position that she didn't know what was in the contract and it was never explained to her, and "When I signed my name to that contract I did not know what I was signing." The latter contention is quite inconsistent with the former.

For the reasons stated, the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

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HUBERT SCHUMACHER,

Appellee,

v.

AARON WEINER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 619²

Opinion filed June 17, 1925.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for \$94.80, recovered against him by the plaintiff in the Municipal Court of Chicago. The action brought by the plaintiff was for the recovery of damages alleged to have been caused to the plaintiff's automobile, in a collision with one driven by the defendant. It was the plaintiff's theory that the collision was caused by the negligent driving of the defendant, and it was the theory of the defendant that he was not guilty of such negligence but that the collision was caused by the negligent driving of the plaintiff.

The collision occurred on an east and west concrete highway in Cook County. This highway was about 18 feet in width. There was some dirt or gravel, level with the highway, extending along each side of the concrete, the width of which is disputed. The accident occurred on a clear day about 3 o'clock in the morning when the road was dry. The plaintiff was driving his Chevrolet touring car east and the traffic in that direction was very light. The defendant was driving west in a Six Cylinder Buick. It was Sunday morning and

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FROM: [illegible]

RE: [illegible]

DATE: [illegible]

2381A.019

Opinion filed June 17, 1985.

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the traffic going west, coming out of the City, was very heavy. There was a line of automobiles going in that direction on the north side of this highway. Apparently, there was a slow moving car in the line headed west and the car behind this slow moving car pulled out onto the south side of the road and passed it. The defendant then drove his car out of the west bound line, with the intention of passing around the car which seems to have been going slower than the rest. He did not get around this car, however, before the collision in question occurred, - the two cars colliding at their left front corners.

The plaintiff testified that as he was driving east, past "this string of machines" going west, he saw two cars pull out on the south side of the highway, one of which got in ahead of another car and returned to the west bound line, "and the other one could not get in and came right on to me." He testified that he was going about 25 miles an hour when these machines pulled out and at that time they were over a block from him, ^{and} there were about half a dozen cars between them in the west bound line. When the defendant's car pulled out of the line, the plaintiff testified, there were no cars in the southpart of the road, between him and the defendant's car. Apparently, the plaintiff supposed the defendant would not come fully over into the south side of the road when the latter saw him coming only a short distance away, or that he would return into his place in the line; but when he did not do so, the plaintiff says, "I stepped on my brake as hard as I could." At that time the cars were about 150 feet apart; and when they came together ,

plaintiff's car was just moving and he could not state at what rate of speed the defendant's car was moving. The plaintiff further testified his car moved about 30 feet after he put on the brakes. At the time of the collision, the right side of the plaintiff's car was about a foot inside of the edge of the concrete pavement. The plaintiff testified that "I was as far to the edge as I could get on the pavement." He testified there was a ditch there,- "say, three or four feet" outside the highway.

A witness who was playing golf at a point opposite the place of the collision, just south of this road, testified that he did not see the cars before they collided but that he walked over to the place of the collision as soon as it occurred, and he found both cars on the south side of the road. Another witness who was driving his car east along this highway, about one thousand feet behind the plaintiff, testified that the traffic going east was very light, while that going west was very heavy at the time of this occurrence.

The defendant testified that the gravel or dirt extension of the highway, outside the concrete pavement, extended south of the pavement "maybe three feet." His brother-in-law, who was riding with him at the time of the collision, testified that this dirt space was "four or five feet, maybe six," and the wife of the latter testified that there was "five or six feet of earth between the pavement and the ditch." The defendant testified that he pulled out to pass a car which was going slowly and after he pulled out, he went three or four feet before the accident. He testified further that when he pulled out he saw the plaintiff coming about a block away and

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he thought the plaintiff was driving about 30 miles an hour; that when he saw him coming he wanted to turn in to his right but could not do so "because the other parties ahead of me would not let me." He testified he then made a dead stop and at that time the plaintiff was 100 feet away, and the defendant remained standing still until the plaintiff ran into him. On cross-examination, the defendant testified that his car was a left hand drive, and as he pulled out of the line he could see the plaintiff coming a block away, and when he saw him, he, (the defendant) had not completely pulled out of the line, but "I could not then get back in line because the car which was behind me closed in the gap." He testified that he came to a full stop before he had completely moved out of line, with the front of his car about a foot over the middle line of the road. He testified there was plenty of room on his right for the west bound cars to pass him. The defendant's brother-in-law testified that when the defendant's car came to a stop the plaintiff's car was 75 or 100 feet away and when they came together the two cars over-lapped 12 or 18 inches, with the plaintiff's about a foot inside the south edge of the concrete. This witness gave testimony contradicting that of the defendant in one respect, when he said that the defendant probably went 100 feet or a little more than that, after he pulled out of the west bound line. He said the defendant's car was about in the center of the road at the time of the collision. The wife of the last witness referred to, testified that the plaintiff's car was about 75 feet away when the defendant's car was brought to a stop.

Even if we assume, on this evidence, that the defendant brought his car to a stop before the collision took place, we could not say that the finding of the trial court, to the effect that the defendant was guilty of negligence, and that it could not be said that the plaintiff failed to exercise due care, was against the manifest weight of the evidence. The undisputed testimony shows that at the time the defendant started out of the west bound line of cars, in an effort to get ahead, he had a clear view of the plaintiff's car coming east, approximately a block away, and he had this view the minute he started to leave the line of cars in which he was driving, as his car was a left hand drive. The undisputed evidence further shows that at the time he attempted to go around this car in front of him, there were half a dozen cars in the line going west, between him and the plaintiff. If he had been in the exercise of the proper degree of care, as soon as he had moved to the south two or three feet saw the plaintiff coming, and the other cars in the line ahead between them, he would have made no further attempt to leave the west bound line, but would have stayed in that line, where he belonged. The plaintiff was justified in assuming that that was what would take place.

The question of whether there was contributory negligence on the part of the plaintiff was a question for the trial court in the absence of a jury. In our opinion the court's finding on that issue may not be said to be against the manifest weight of the evidence. In arguing the contrary the defendant points out that the evidence shows that when the cars came together they over-lapped a foot or a foot and a half, and the

Even if we assume, as this witness, that the

testimony of the witness is not reliable, the

fact remains, we could not say that the finding of the jury

was, in the absence of the testimony of the witness, of

negligence, and that it might not be said that the jury

acted in violation of the law, and that the verdict was

of the witness. The defendant's testimony about the fact of

the defendant's escape from the boat found him of

fact, is in effect to say that, he had a clear view of the

defendant's escape from the boat, and that he saw him

and he saw him when the witness is stated to have seen

him at the time he was in the boat, and that he saw him

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The witness, in his testimony, has not

testified in the case of the defendant's escape from the boat

trial court in the absence of a jury. He has testified in the

fact that he saw the defendant escape from the boat, and that

he saw him when the witness is stated to have seen

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plaintiff's right wheel was a foot inside the concrete pavement, and there was some dirt roadway outside of that pavement and inside the line of the ditch which extended along the south side of the road. The space between the concrete highway and the ditch is a disputed point in the testimony. However, the defendant himself seems to agree with the plaintiff to the effect that it was about 3 feet. The question of whether or not a party has exercised a proper degree of care under all the circumstances, may not be determined adversely to such party by demonstrating, after the occurrence has passed, that in spite of the negligence of someone else he might have avoided the collision, which took place, if he had done differently. If these two cars overlapped a foot and a half when they collided, and there was a foot outside the plaintiff's car, on the concrete highway, and three feet between that roadway and the ditch, it is evident that this collision would have been avoided if the plaintiff had driven his car two feet off the concrete onto the dirt part of the road, but the fact that he did not do so does not mean that he did not do what an ordinarily prudent person would have done, when faced with the same situation that he faced when the defendant drove his car out of the west bound line and came over into the south part of the road. Of course before the cars came to a standstill the plaintiff could not know how far off the road it was going to be necessary for him to go in order to clear the defendant's car. It is quite clear that if he went very far off the road, he would be in the ditch. Ordinary care does not require him, in the moment or two given for a decision, to accurately determine just what the situation is going to develop. The ditch was there

[illegible]

and only a few feet of dirt separated the concrete highway from the ditch. Under all the circumstances we are of the opinion that the plaintiff acted as an ordinarily prudent person would have acted under similar circumstances.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

and only a few feet of the distance between
 the two hills. There is no possibility of one of the
 peaks being the highest point on the mountain range.
 The peaks are of the same height and are of the same
 shape.

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THE PEAKS ARE OF THE SAME HEIGHT AND ARE OF THE SAME
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238/619

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ALBERT R. LELAND,

Appellant,

v.

CHARLOTTE G. LELAND,

Appellee.

238 I.A. 619³

APPEAL FROM

SUPERIOR COURT,

CHANDLER COUNTY.

~~238 I.A. 619~~

Opinion filed June 17, 1925.

MR. JUSTICE [Name] delivered the opinion of the court.

The complainant, Albert R. Leland, 38, is a mill
 for divorce in the Superior Court of Chandler County, charging
 his wife, Charlotte G. Leland, with adultery. [Name]
 service of summons was had upon the defendant but she refused
 to answer, the court was set for hearing and the complainant
 appeared with his attorneys and put in his case. The
 complainant testified that he and the defendant had been
 living together as husband and wife for about twenty years,
 that they had three children, all boys, the youngest
 being eight years of age and the oldest seventeen. The
 name of the oldest boy is Carl B. Leland. The complainant
 and his wife and the parents of the latter, had been living
 together practically all of the period of the married
 life of the parties to this case. The bill of complaint was
 filed on December 26, 1923. The complainant testified that
 he ceased co-habiting with his wife on December 26, 1923.
 The woman with whom he alleged his wife was co-habiting
 was Carl B. Leland, the pastor of the [Name] of [Name]

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they both were members. Evidence subsequently appearing in the record shows that the complainant and his wife were very active in the affairs of their church and very intimate in their friendship with the pastor and his wife. The complainant testified that he first became suspicious that his wife's regard for Case had gone beyond the stage of friendship, at a time when Case became ill and went to a sanitarium, at which time his wife also seemed to have something in the nature of a breakdown, took to her bed for several days and most of the time; and the complainant was not able to find out what the trouble was. In connection with his illness, Case was first in a hospital in Chicago for a few days and then went to a sanitarium at St. Paul, Minnesota.

It would seem from the testimony of the complainant that Case was at his home between the time he left the hospital in Chicago and the time he went to St. Paul. When the complainant was trying to find out what was the matter with his wife and what caused her to feel as she did, she told him she was greatly worried about her junior work in the church, because Case was going to St. Paul and she was very anxious to get some information from him about her work before he left. She wrote Case a note, which she asked her husband to take over to Case's home. He testified that he became suspicious and opened it, and he found it was not about her work in the church, but that it referred to a previous note she had addressed to Case at the hospital in Chicago in which she was writing a reply to the letter which Case had written to her, and she begged him for some word from Case to let her know that everything was all right. Indeed she had not

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deliver this note to Cass, because he was not at home, and when he returned to his wife she asked him if he had delivered it and he told her that he had not done so, he testified, she "almost collapsed" and he thought she would faint.

He testified further that a day or two later he picked up some of his mail that had been left on the sideboard, and in doing so he noticed another letter under the cover on the sideboard, which he discovered was a letter written by his wife to Cass at the sanitarium in St. Paul. This letter he also opened. In this letter, among other things, the defendant wrote Cass; "Now, it just stands this way as far as I am concerned; you know how I have struggled, you know I feel as though I have taken the right step, but know I have never given up the friend that I have loved. I have got to know how it is otherwise. Have I or have I not been bothering you? I would have let all of this go until you came home but I have just gone to pieces and feel that I must know. Are you trying to have me just quit coming to you in any way? This is a damn letter to write to anyone who is sick but I just worried myself sick over it and I have let much of it alone myself to give up. Your friend loves you just the same and hopes that this will not add to your trouble. Please let me know this time. * * * As ever, Charlotte." A few days later a reply from Cass was received, addressed to both Mr. and Mrs. Leland, as "Dear Albert and Charlotte". Among other things, in this letter, Cass, referring to Mrs. Leland, wrote: "I do not know how many times she has rattled it into her head that I was displeased with her about something, so

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now, Mr. Man, will you tell that estimable wife of yours that the time is yet to come when she has displeased me and I do not expect it to come."

The complainant testified that he first spoke to his wife about this matter on the night of November 8, 1937; that he came home and found her crying and he asked her what the trouble was and she did not want to talk about it, but he insisted and said he felt he had a right to know. This led to a conversation between them, in which he finally told her that it looked to him as though she was beginning "to care too much for Carl." That conversation lasted most of the night. He asked his wife many questions, one of which was, "How far has this thing gone?" and she said she could not tell him; and when he wanted to know why, she said that she could not betray a friend. After that, further conversation was had and he asked her many further questions, and among other things, he asked her just how far Carl had gone with her and she finally said that he might as well know - he had gone "as far as I let him." The complainant further testified that on the afternoon of Sunday, November 11, he had a further talk with his wife, and stated, among other things, that he suggested that she probably had not been the only one involved with Carl. He testified that his wife made him promise he would do nothing to harm Carl; that she assured him that she had discontinued her associations with him, and asked for forgiveness and asked him to forget the matter. He told her that he felt he had come only to perform as a court officer and he felt she ought to give him something to show to Carl, so that he could make his confession to his part in the

affair. He testified that she hesitated about this and he told her to think it over, and he then went away; that he had an appointment which took him away from home that evening and when he returned, at about eleven o'clock, his wife was in bed asleep, and he found pinned to his pillow a written confession, in the form of a letter addressed to him, made up of some ten pages; that as he was reading it, she woke up and they again talked about the matter. He testified that this confession did not refer to anything by name, and that he told his wife he wanted the name stated definitely in the confession, and "I want you to name definitely about when it first occurred, to the best of your memory, and about how many times it happened." Again, apparently, the conversation lasted most of the night, and finally, at her direction, he procured pencil and paper for her and she wrote a second statement or confession. We shall have occasion to refer to these two written statements of hers later.

The complainant testified that he then called upon four men connected with their church and showed them copies of his wife's statements, and that they ^{said they} thought there must be something wrong with his wife, mentally, "and I told them I hoped to God it was;" that they suggested that she be taken to an alienist to be examined; that they made arrangements for such an examination and he took her to the alienist and left her there; that after his examination the doctor said that his wife was "perfectly sane." He testified that he was convinced that his wife had told him the truth; that she had written him several times subsequent to these events, admitting her guilt but praying his forgiveness. The written

statements which Mrs. Island had made were introduced in evidence on this default hearing. The complainant testified that his wife was forty years of age and he was forty-three.

The complainant's father, who was also a minister, testified to the apparently happy family life of his son and his family, and that he had known nothing of this trouble until his son had told him on November 18th. He further testified that previous to that time he had received a letter from the defendant, explaining that "she had a friend who had become infatuated with a man and gone to the west, but it had stopped, and wanted to know what I thought she should tell her friend as to the outcome, as to whether it could be forgiven, and as to whether the parties involved could secure a divorce." Apparently at or about the time the complainant told his father of his discovery, the latter had a telephone message from the defendant, asking for permission to come and see him, and he later saw her and talked with her; and he testified that at that time "She confessed that she was the party for whom she asked the question; and she was in great agitation * * * She asked questions over and over again as to forgiveness, and in talking she was very lenient to the guilty party * * * She said she had gone to him and he had told her something of his family relations and she had fallen and she was terrified about it and she did not know what she should do."

It appears from the record that the oldest boy, Harold, was in court on the occasion of this default hearing, and he was asked a number of questions by the court, in answer to which he testified that he talked with Dr. Snes some-

there around the first of December; that his mother had written a letter to Mr. Case, which she thought was to be taken over there by Harold's grandfather, but Harold took it over himself; that at this time Harold had known of this situation for several days, and he went up there to find out about it, and told Mr. Case that he wanted to know his side of it; that Case would not say anything directly about it but said that it was a terrible accident; that he told Case he thought his father was going to get a divorce, and Case said it was wrong for his father to do that, - that it would be better to forgive."

The foregoing was the substance of all the testimony heard upon the default hearing, at the conclusion of which the chancellor indicated that a decree would be granted.

On the day following this default hearing, the alleged co-respondent, Carl W. Case, notified counsel for the complainant that on the next day he would present a petition to the chancellor, asking that he be appointed guardian of the person and estate of the complainant, and that he be permitted to examine witnesses and call other witnesses and testify himself. Such a petition notified a judge, who said that he would not do so, but that he would appoint Mr. Frederick L. Brown, who was the lawyer who represented the co-respondent in connection with the presentation of the petition, and the cause was set down for further hearing. It is contended that although Mr. Brown was appointed to act in the case as guardian of the person and estate of the complainant, he really filled throughout the remainder of the hearing, which lasted a number of days, was rather that of counsel for the

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correspondent, and the action of the Chancellor in permitting this is complained of as error. It is within the sound discretion of the court to appoint someone to act in the capacity of amicus curiae, if, in the opinion of the court, the situation is such as to justify that course. It is doubtless true that the function of amicus curiae is not to take upon himself the management of the cause, but to act impartially as between the parties involved, and endeavor to see that the court is not imposed upon. However, we are of the opinion that the question of just what the latitude of amicus curiae shall be in a given case is also a matter for the sound discretion of the trial court, in view of all the facts involved. Where a charge of adultery is made in a divorce case, and a co-respondent is named and the latter denies that any adultery has been committed, although the co-respondent is not a party to the case and may not by right be assigned such a position, it has been held that such co-respondent may attend the trial of the case and should be permitted to testify though not called by either of the parties. As was pointed out in Smith v. Smith, 28 N.Y. Supp. 57, in such a situation the court will not be likely to decline to receive any light that may be thrown on the issues involved, even though that light be by the alleged co-respondent. Especially should this be the case where the adultery alleged by the complainant is admitted by the defendant. It may well be that in such a situation the co-respondent has even more at stake than at least one, if not both, of the parties in the case. Under all the circumstances presented in the case at bar, we are of the opinion that the Chancellor did

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not abuse his discretion in appointing Mr. Brown, as general
counsel, the latitude which he did. It was for this reason
that the motion submitted by Mr. Brown in this court, for
leave to file a brief in this court, as general counsel was
allowed. This court has been anxious, just as we are con-
fident the trial court was, to receive all the assistance
possible, in our effort to reach a correct decision of
the issues presented in this very unfortunate case.

When the case came on for further hearing, after
Mr. Brown had been appointed general counsel, Mr. William H.
Hose appeared before the trial court as counsel for the
defendant, Mrs. Leland, and presented his motion for leave
to enter the defendant's appearance and his appearance as
her attorney, without prejudice to the default which had
been entered against her. Further reference to this motion
will be made later. In the hearings which followed, all
the parties involved were thus represented by their res-
pective counsel. Although, on the record, the case still
remained as a default case, an order of default having been
entered against the defendant for her failure to appear and
file an answer, which order of default was never vacated or
set aside, nevertheless, for all practical purposes, after
the appointment of Mr. Brown, as general counsel and the
appearance of Mr. Hose as counsel for the defendant, the
case proceeded and was heard on a contested case. The con-
flict was resolved to the stand and cross-examined at
length by anxious counsel, and as was Harold Leland. Three
of the four members of the court, with whom Leland conferred

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A rather severe criticism of counsel for the defendant was made by anima during in the trial court and again in this court. We feel that it would be neither fair nor just to counsel for the defendant if we did not say that, in our opinion, that criticism is without any foundation, so far as any part of the record of this case discloses. The course which the record shows the defendant herself has taken throughout the history of this case is entirely consistent. After she had made her confessions of adultery to her husband and the latter had filed his bill for divorce and she had been served with a summons, she did not appear to defend, but suffered a default to be taken against her. If her confessions were true, she could hardly have adopted any other course. The record shows that she made no move to either engage a lawyer or seek legal advice, until a subpoena was served upon her by anima during and she was paid a witness fee and it became apparent that she was going to be obliged to appear in court and be put upon the witness stand for examination and cross-examination. Not until then was counsel engaged to represent her. It appears from the record that her father then retained Mr. Woods to represent his daughter. Attention is called to the fact that although counsel obtained leave to file his appearance representing the defendant, he did not ask that the default order which had been entered against his client be vacated. Presumably, when counsel was retained, he conferred with his client. It seems clear that counsel would not make an application to have the default set aside and leave given his client to file an answer, unless she was in a position to deny the charges brought against her in the bill

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of complaint. If, in confessing the adultery charge, she was telling the truth, she was not in a position to file any such answer. If counsel was convinced that his client was telling him the truth, he is certainly not open to just criticism if he followed the only course that would seem to have been open to any honorable lawyer, who had been either retained or appointed to advise this unfortunate woman. The same thing is true, we believe, with reference to all that counsel afterward did in this case. In our opinion, he would have been guilty of neglect if he had done less. The contention is made that the defendant employed Mr. Ross to prove her guilt of adultery and this fact could only be accounted for by the explanation that she is mentally deranged. Of course counsel was not retained for that purpose nor did he attempt to prove the charge of adultery. It was for the complainant to do that. The situation is in no way changed because the defendant admitted the charge brought against her. When, in answer to her admissions, the co-respondent, in effect, charged that she was either insane or a perjurer, she denied those charges, and, in substance, contended that she was sane and that she had been truthful. The efforts of her counsel to substantiate her position with regard to those matters, was entirely proper. The fact that this tended to establish the truth of the confession does not affect the situation. This court believes that no one may fairly doubt the fact that Mr. Ross was convinced that his client told the truth. In our opinion, that conviction of counsel was not only justified but was correct. If so, the course he pursued in this case was, without any doubt whatever, beyond any just criticism.

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It is true in this case plaintiff complains also of the conduct of the complainant in this case and contends that by reason of such conduct he is not entitled to much consideration in a court of equity. It is contended that he procured the alleged confessions from his wife by so-called third degree methods; that he seemed not to hesitate to expose before the world the secret sins of the mother of his three children; that he brought his eldest son into court to testify against the purity of his own mother, and that he seemed more devoted to the task of getting the alleged co-respondent in this case out of the ministry than in protecting his own family. The question of the propriety of the course adopted by the complainant in this case has nothing to do with the issues presented for our consideration and is a matter with which this court may not concern itself. While reference is being made to the conduct of complainant, it should be noted that the record is silent as to any complaint against him on the part of the defendant. Neither in her confessions under her subsequent letters to him, nor in her testimony, does she have anything to say against his treatment of her as his wife. On the contrary, she mentions the fact that he has always been good and kind to her, and she expresses her appreciation of it.

Contention is also made, by plaintiff's counsel, in his brief, that the complainant has an ulterior motive in suing his wife for a divorce, and that he desires to be rid of her in order to marry someone else. There may be situations in divorce cases, when the motive of the com-

plainant may be material, but no such situation is presented here. Such a question might be important if the complainant's case depended largely, if not entirely, upon an alleged confession which had been repudiated, and where it was contended that the confession was procured by improper methods and for the sole purpose of enabling the complainant to carry out his intention. In the case at bar the confessions of the defendant have never been repudiated, but, on the contrary, they have been repeated to several individuals, other than the complainant, at least one of them being entirely disinterested, and we have the testimony of those witnesses (one of them, himself a minister) supporting the confessions of the defendant, and in addition to that we have the sworn testimony of the defendant, in open court. Although cross-examined at great length, her testimony confirmed in all respects, the confessions she had made.

And again contends in this case that the defendant's confessions were procured by what are referred to as third degree methods. The evidence shows that the complainant did ask many questions of his wife, during the time they discussed this matter, at which time she made the alleged admissions. In our opinion, from all the testimony in the record, on the question, we are of the opinion that the confessions were freely made, but this point is, in our opinion, of little moment in view of the fact that, as far as the statements of the defendant were concerned, they do not rest upon her confessions at all but upon her sworn testimony. Where, after making a confession, a defendant appears in open court, as a witness, and testifies,

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the confession is thereafter of little or no value except as it may tend to confirm or impeach the testimony which the defendant has given. In the case at bar the testimony given by the defendant confirms her admissions and confessions in all material respects.

The position taken by the defendant in this case through her counsel, is merely one in which she contends that she is not suffering from a deranged mind, as was attempted to be made out by expert opinion in the trial court, nor, if that position advanced by her is sustained, is she guilty of perjury, as expert opinion further contended in that court.

The charge of collusion between the parties does not seem to be seriously advanced. It is said by expert opinion that if the parties did not actually conspire together, to the end that the complainant might procure a divorce, they, at least, did "work together in this case." In our opinion, there is no reasonable room for any such contention. The fact that the complainant's charges of misconduct, and the defendant's admissions as to such misconduct, tend to the same end, cannot justify a charge that they are "working together." Any possible charge of collusion in this case would be entirely defeated by the mere reading of several letters which the defendant wrote her husband, following her admissions to him, one of which was written just after she learned that he was actually about to file a bill for divorce. The bitter remorse expressed by the defendant in this letter and the pleadings she puts forth to her husband, in an effort to induce him

to forgive her and forget what has happened; not so much for the sake of her, as for the sake of their children; are not the writings of one trying to assist in the procuring of a decree of divorce.

The real issue presented in this case, involves the sole question of whether the defendant was or was not guilty of adulterous conduct with Dr. Case. That is the only question presented for the determination of the court on this record. The defendant states under oath that she did commit adultery, with him. The co-respondent, on the other hand, states under oath that she did not. The question is: Who was telling the truth? In an effort to show that Dr. Case was telling the truth, ~~various~~ various ~~various~~ various endeavored to establish the fact that the defendant was suffering from a deranged mind, and that the many incidents which she described, involving intimate familiarity on the part of Dr. Case and herself, and at least four acts of sexual intercourse, were occurrences that really ~~never~~ never happened, but which had only been imagined or dreamed by the defendant.

We have carefully considered all the evidence in the record, pertaining to the question of the defendant's mental condition and we are of the opinion that if the Chancellor dismissed the complainant's bill on the theory that the evidence showed that the defendant was suffering from a deranged mind, then the decree was clearly against the manifest weight of the evidence. There is much incidental testimony, here and there in the record, which bears on this

question, but we shall refer only to the testimony bearing directly upon it, which was given by the four doctors to whom we have heretofore referred. The two medical witnesses who were called by the defense had never examined the defendant but they had been present in the court room during the taking of the testimony and they had observed her throughout that time and while she was on the witness stand, and had heard her testimony, and they gave it as their opinion that she was suffering from a deranged mind; that the experiences she described were not actual occurrences but were things she imagined. These two medical witnesses were called to state the reasons for their conclusions, and, in our opinion, the reasons which they gave rendered their testimony to such an extent as to make it quite reliable. Both of them refer to certain testimony which the defendant gave, as to an experience she had during the summer previous to the filing of the bill in this case, at Cedar Lake, Indiana; and the witness stated that that experience was regarded by them as a very significant point which tended to support their conclusion that the incidents which she claimed had taken place, were merely the product of her imagination. That experience was described by the defendant in her testimony in the following manner: "That summer, when I was away, after a remark that my husband made to me, I was absolutely as to what I had done." It is the record of this confession in writing which the defendant made to her husband, she said that the correspondent had led her like a child; that her senses must have been dulled; that she did not realize what it all meant, "and I cannot even think he meant to."



Then she referred to this Galt Lake incident as follows:

"But something seemed to wake me up, and when up at the lake this summer you said to me, 'I trust you, as I know you are a Christian' the whole light came and I stopped."

To say that this shows that the defendant had theretofore been living in a "dream world" and that the experiences she related as having occurred between her and the co-defendants were imaginary, in our opinion, does violence to one's common sense. Even the experiences of children teach one that if a person has been doing wrong, and attempting to justify that wrong, against his own better judgment, and his conscience has been lulled to sleep or become dulled, nothing will be quite so sure to "wake up" that person and arouse his dulled or slumbering conscience, as an expression of trust and confidence on the part of someone to whom he owes obedience, or honest service, or faithful love and devotion.

One of these expert witnesses testified that one of the elements he took into consideration in connection with the incident described above, was "the fact that she did not, until this awakening came, realize that she had done wrong," and the fact that, although she had been educated in the ordinary morality of social life, she did not know whether those things she described were right or wrong "until some chance remark brings the realization." He testified that this showed that the experiences were "a dream or wish fulfillment and not a reality." The premises used by the witness are false premises, for the record shows that the defendant did appreciate that the familiarities taking place between her and her alleged paramour were wrong. After almost the first really serious familiarity that took place

between them, the defendant testified, "I wrote him and said I would not permit anything of that kind;" and she also testified that the co-respondent later said he would not do it again. She repeatedly says, both in the course of her confessions and in the course of her testimony, that she trusted Dr. Chas; that she thought he would not be wrong, but that she began to have her doubts as to whether these liberties were right and she asked him to come over to her house that she might talk with him, and she told him that these things ought to cease at once and he then asked her whether their familiarities were interfering in any way with her regard for her husband, and she said she did not think they were; and that he then told her that if that were the case, he did not see that there was any particular harm in them. In the course of this conversation, the defendant says she was in tears and the co-respondent endeavored to comfort her and, in so doing, he put his arm about her and fondled her; and this went from one step to another and before they separated she had become so aroused that she yielded to another act of sexual intercourse. If the reasonable limits of an opinion permitted, a number of incidents recited in the record could be referred to showing that these things were troubling the defendant's conscience all through the year and a half, during which they were happening.

As another reason for the opinion that the defendant was mentally deranged both of these experts who testified to that effect, testified in substance that the defend-

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and had stated that she went blind in connection with some of the incidents, and that she did not know exactly what happened. Again the premises used by these witnesses as a basis for their opinions are without any foundation whatever, in the record. In the course of her testimony, while the defendant was being interrogated as to the various incidents that took place between herself and the co-defendant, she described one act of impropriety, and she was then asked if that made her angry and she answered, "No, it did not make me angry because I was blind."

She was then asked to explain what she meant by that and she answered, "He had come at me so absolutely gradual that I just seemed to feel that he thought he was doing right and I was taking his say-so for it. I did not feel any less love for my husband and so he had me under his influence."

In the course of her confession to her husband which the defendant made in writing, after describing some improprieties that had taken place, she wrote: "I am telling you all this just because I want to feel that you know the whole truth. I was blind but now I am and the hurt I have given you is my punishment. This is a bitter day for both; you because the one you used to love hurt you, and me because I have so deeply hurt the one that I most worship, and I mean it and can say to you, because I think you know full well that, with all the other mistakes, I am truthful with you." After the defendant made her confession to her husband and she learned that Mr. Gars was denying the truth of them and was contending that something must be wrong with her mentally, she wrote him a letter, which in itself, is an argument in support of her mentality, and in the course

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She also gave the time of these intercourses approximately. According to her testimony, the first act of intercourse occurred early in the fall of 1932, - September or October; and the last was in the spring of 1933, - April or May. She described four acts of sexual intercourse and she gave the places at which they occurred definitely; - three being in the parlor of her home, when she and the correspondent were the only ones in the house, and the other being in his study. She testified that she thought the first occurrence was at the house but she was not sure.

In our opinion, another weakness in the testimony of these expert witnesses lies in the fact that they regard some of the experiences described by the defendant, which did not involve Dr. Case, to be real, and that the things she described in that connection actually did happen, and some of these things were considered by them as elements in their conclusion that the other experiences, which she testified about, which did involve Dr. Case, were not real but dreams. When they were asked, on cross-examination, why they believed some of the things she described to be true and others to be merely imaginary, they stated that the first were incidents which involved herself alone and the others were incidents which involved people other than herself; and also, that she had hesitated to reveal the former. In our opinion, the reasons they give for their differentiation were quite unsatisfactory.

The alienist to whom the defendant was sent for examination by the church committee examined her thoroughly on two different occasions with no one else present. In our

ported in writing that he found her a very sensitive woman and of a highly religious nature, and that such persons were generally more than normally susceptible, but that he could find no symptoms of psychosis in Mrs. Leland and that she presented no sign of insanity. This doctor testified at the trial and he was asked what he meant by "susceptible" and he answered that he meant that she "was easily influenced." He testified further that after he had made his examinations, Mr. Leland called at his office to see what he had found, and he told him that he had been unable to detect any delusions in Mrs. Leland. In the course of his testimony, he was asked by animator asking whether there was any question in his mind, after he had examined the defendant, about the truth value of the confessions she had made, and he answered "I could not find any reason to doubt it. That is just what I was trying to find but I was unable to find any delusion in her mind, - I could not demonstrate it." In the course of his testimony, the complainant testified that when he went to talk with this doctor, after he had examined his wife, he asked the doctor if Mrs. Leland was insane and that the doctor replied, "There is no trace of insanity. Of course, any woman, you might say, is liable to fall down like this, but from a legal standpoint I could not say that she is legally insane." He then testified that he asked the doctor if these things took place as his wife had confessed, in his opinion, and that the doctor replied, "No one who did not see it could say that it did or did not. But it probably did. I have hundreds of cases just like it all the time. It is just a psychic fit." In his opinion, the judgment of this alienist and the testimony he gave, is con-

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titled to particular consideration. He was the disinterested doctor designated by the church committee to whom the complainant was asked to take his wife for expert examination. The members constituting this committee who testified in this case, stated that in arranging to have Mrs. Island examined by this alienist, it was their object to procure the judgment of an alienist of the highest possible standing. At the time this doctor made his examinations of Mrs. Island, and his reports to her husband and the committee, it was their hope, as expressed by all of them, that it would be found that she was the victim of some mental disorder. At that time there was no thought of this doctor testifying in court. The examinations he made took place almost two months before the facts in this case became public. Neither the complainant nor the defendant had anything to do with the choice of this doctor as the examining alienist, but he was chosen solely by those representing the church, who were interested in getting the truth of the situation, with the hope that it might be such as to exonerate the pastor in whom they all had confidence. No question is raised as to the ability of this doctor chosen in this manner. Under all the circumstances, his opinion is entitled to great weight in this case.

The remaining medical witness, who testified that in his opinion Mrs. Island was not mentally deranged, did not have an opportunity to examine her personally, but he sat in the court room throughout the hearing, heard all the testimony and observed the defendant throughout the giving of her testimony. He testified that he had neither seen nor heard any evidence of a mental phenomenon which could, singly or in combin-

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this point, that the record contains on one hand the testimony of the defendant, that she was guilty of adultery, and on the other hand, the testimony of the co-respondent denying every material allegation. In our opinion, that is not an accurate analysis of the record. Of course, as to the acts of adultery themselves, we have no testimony other than that of the two principals. Scarcely ever is the situation other than that. But, while the testimony of one or the other of the parties may not be supported by direct testimony of other witnesses on the question of whether the alleged acts did or did not take place, usually a record will disclose circumstances which will be corroborative of the testimony of one of the parties. In our opinion there are such corroborative circumstances in the record of the case at bar.

There are quite a number of points about the testimony of the defendant in this case, which are admitted to be true by Dr. Rice. He admits that some of these things that she described as having taken place did take place at about the time she said they did, but all of these incidents and circumstances which are to be found in the testimony and which he corroborates are such as do not carry any reflection upon him. That the incidents described by her, which are damaging to him, he denies. On the question of the interest of the respective parties, of course, the defendant had nothing to gain and everything to lose by telling the story she did, while the opposite is true so far as Dr. Rice is concerned.

In our opinion it would be an extremely difficult task for one to read the confessions which the defendant wrote;

the letters she subsequently wrote to her husband, in which she appealed for his forgiveness; the letter which she wrote to Mr. Chas. expressing her surprise at his attitude; and her testimony as it appears throughout nearly one hundred and fifty pages of the record, without being marked with a conviction of genuineness. There are many things about her confessions, her letters and her testimony, which tend in that direction, which cannot be set forth within the limits of an opinion.

In beginning her original confession she stated that it was the hardest thing she had ever done, because, in a sense, she was betraying a friend. She explained that the beginning of her indiscretions occurred one day when she had been talking with her pastor, when, on a sudden impulse, she took his hand and kissed it, and she explained that incident by reminding her husband that she had always been of an affectionate disposition. She went on to describe one incident after another, and in the course of the confession she wrote, "However I just gradually came to feel that I was both fighting against it, but I didn't take the proper steps. I have seen him fight it so that he even told me that if I had not fully trusted him and it would have been better. I was glib and I believed in him and didn't realize what I was doing. I told you I would take the blame. It seems as if I was the one who took the first step and then I was not sure in my mind." This and many other similar phrases that are to be found in the communications of the defendant have the ring of truth about them.

any of escape, the witness then related the details of the incident which she had with Dr. Cass in avoiding describing.

It is apparent from the evidence in the record that Mrs. Leland was a passionate woman. Two or three times during her testimony, after she had described incidents which had occurred, she was asked, by private examination, whether such action on the part of Dr. Cass did not make her angry and she explained her answers in the negative by adding that her own passions had become so aroused that she was not able to refuse his advances.

In response to questions by her own counsel, she testified that she would have escaped the ordeal of testifying if she could; that she had not come into the court voluntarily, but that she had been subpoenaed and paid a witness fee.

In connection with the contradictory testimony of the defendant and Dr. Cass, we have already noted the interrogations of these respective witnesses. Another fact to be noted is that there was no apparent desire on the part of the defendant, to harm Dr. Cass. On the contrary, she appears to have done everything she could to protect him. She told her husband to "try and put yourself in his shoes and see how he feels" and she asked him to think what "Christ's way would be," and she quotes the words of Christ, "All things therefore ye would that men should do unto you, even so do ye also unto them." She told her husband to remember that they were both Christians and that it was her prayer that God would direct him, and she suggested to him that the thing to do was to go to Dr. Cass or write to him and let him know that she had told her

that she has not done so through any malice. She tells him that her love for her husband was too great "to hold back and live a lie, when I saw how he felt. I am a Christian and a Christian cannot lie and be at peace with her God. He knows and we cannot get away from that. * * * I am not placing all the blame on you, but you have things out I did not * * * That seems terrible to me is that you, a man who professes to be a Christian and who prays and prays as you do, can ^{out} say a truth. Don't you know that God knows? You are doing no good by saying. You nor anyone cannot confess sins to God, the heavenly Father, and deny them to the one they have injured and know that they have God's forgiveness. How can you get up Sundays and say, 'Let the words of my lips and the meditations of my heart be acceptable in thy sight?' How can you pray, as you did the last two Sundays, knowing that you were doing wrong?" She then expresses her pity for him and asks, "Are you too weak to take a right stand?" and then she adds, "I will strengthen thee" says the Lord." She then refers to the course her husband has taken and says that she thinks he acted as a Christian, for, "He gave you a chance in a Christian way. He offered you a chance to confess to what you knew is the truth and then quietly step down and out, and he would not disturb your life. Could he have done more as a Christian, doing so?" Put yourself in his place. And you, the man who is loved and trusted by many, can deliberately tell an untruth and lie and say, 'I am a Christian.' You might say there were no witnesses, but there are many, and one whose power is greatest. You cannot hide from Him. I have not tried to. As a Christian woman who has done wrong, has pro-

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repented, confessed and been forgiven, my prayer for you is: 'Father, give this man strength and courage to confess his sin; and then, Father, forgive him, let him go and live again, guide him to do the right thing * * *.' Apparently in an effort to weaken the strength of this letter as evidence, Miss Cousin suggests that no doubt her husband wrote it or at least a part of it. It is quite impossible for us to imagine an outraged husband writing his wife's paragon, or one whom he suspected of being that, in any such manner. If this contention is made by Miss Cousin on the theory of collusion, it need only be said that in our opinion there is absolutely no basis in the record for a charge of collusion between those parties.

One of the very unfortunate elements in this case is to be found in Harold's connection with it, but he did go to see Mr. Case and he did have a talk with him, and this having happened, and this case having developed into a contest, it was inevitable that Harold would be drawn into the case as a witness. He was a third year student in high school and when the events of November and December 1903 occurred in his home, it was of course impossible that he should not become cognizant of what the trouble was all about. By considering this boy's testimony it should be kept in mind clearly that throughout this matter he has remained loyal to his mother. While he was on the witness stand he testified, "I felt that I had a right to know what the truth or falsity of these matters. I love my mother and am living there at home with her. I have been bringing her down town and going home with her at night during this trial. I have not turned against her

in any way because of this unfortunate affair and I never will." It will be seen therefore that this boy was in a frame of mind to seize upon anything he could possibly find which would protect his mother, and it may not be doubted that he could have welcomed a statement from Dr. Case to the effect that these improper relations between him and his mother had never taken place, but that they were doubtless the result of some mental trouble with which she was suffering. But, his testimony is to the effect that Dr. Case did not at any time during the time he was talking with him, deny "that the relations between himself and my mother" had been improper. Harold testified that when he talked with Dr. Case the latter "would not say anything directly about it at all. He said it was all a terrible accident." He further testified that he told Dr. Case that his father would probably sue for a divorce and that he replied that that was not the right thing to do but that it would be better to separate. Dr. Case testified as to this conversation, that it lasted about three quarters of an hour; that he told Harold that he was a minor and there was no reason why he should talk to him that Harold had said he was not to find out if the accusations were true; and further, that Harold told his father would now have to get a divorce on account of the confessions because of "the Bible which says that divorce should take place on account of adultery." Dr. Case then testified that he told Harold, in reply to that remark, that he had answered the question "that

the Bible stated distinctly that adultery was the only ground for divorce and that it did not mean at all that divorce was necessary in such a case, and that adultery was a forgivable sin, like other sins." He also testified that Harold remarked that justice was the highest thing there was in the world and "I contradicted that statement and said that justice found its consummation in love and love was the highest thing in the world." Dr. Case testified that he told Harold that "the whole thing was an untruth. He kept asking questions and I refused to answer them." Even on Dr. Case's own version of this conversation with Harold, we find him saying some things that seem very strange, coming from a man falsely accused of such a serious charge as this, as he contends was the true situation.

After some of the evidence had been taken in this case, in a hearing extending over several days, it went over to the following day for argument and on the next day when court convened, counsel for the defendant stated that inasmuch as his client had been placed in a position in which she had, in effect, been charged with perjury, he felt it his duty to ask the court to grant a continuance to enable him to take depositions of certain witnesses in Brooklyn and in Buffalo, where Dr. Case had previously been in charge of churches and it was his contention that this evidence would tend to show that he had left both of these churches under a cloud, involving situations not dissimilar from the one presented in the case at bar. The continuance was granted as requested.

One of the circumstances in this case, which, in our opinion, is quite unfavorable to Dr. Case, is to be found in some of the things he did during that continuance and in the unsatisfactory testimony he gave later in an attempt to explain his actions. In connection with the motion for a continuance, upon the occasion referred to, counsel for the defendant announced to the court that he expected to leave for the east on the following day. So far as the record shows, this was the first intimation of any indication of an investigation along the lines suggested by counsel in his motion. In the testimony which was submitted to the court, after depositions had been taken in the east and the hearing of this case resumed, it developed that Dr. Case, himself, left for the east on the evening of the day the motion for a continuance was made and he was in Buffalo some hours before counsel for the defendant arrived there. These later hearings in the case at New York place only two or three weeks after the motion for a continuance was made and yet, when Dr. Case was on the witness stand and was asked what he did on the day the continuance was granted, between the time he left the court room and the time he took the train for Buffalo on that same evening, and whether during that period he had any talk with anyone or with the officers of his church, he gave several partial answers and then stated he could not give a positive answer, and then said he didn't remember, - that he had forgotten. He testified that he went down to Buffalo that night to be among friends and to rest up a little while. The continuance was granted on Thursday. The evidence shows that Dr. Case left

that night for Buffalo, reaching there in the morning; spent a part of Friday there and left Buffalo Friday night for New York and Brooklyn, arriving there Saturday morning; spent Saturday there and that he then returned to Buffalo where he arrived Sunday morning. The evidence further shows that when Dr. Case was living in Buffalo, among his parishioners were a Mr. and Mrs. Damon; that this man and his wife had separated and when Dr. Case made this trip down there, Mr. Damon was living in Buffalo but Mrs. Damon was making her home with a sister in Cleveland. The evidence further shows that after talking with Mr. Damon in Buffalo on the Sunday above referred to, Dr. Case left for Cleveland, arriving there late in the afternoon. He was asked whether he told Mr. Damon that he was going to Cleveland to talk with his wife and he answered that he had forgotten whether he did or not. Dr. Case testified that when he reached Cleveland he went direct to the place where Mrs. Damon was staying with her sister; and that he had "quite a little talk with her," lasting "probably about three quarters of an hour." He was asked what he talked about with Mrs. Damon and he said he talked with her about her own past, - "It referred back to the little situation that had arisen in the church several years before." He was asked if that was the time when there was a Sunday school superintendent and an assistant superintendent mixed up in it and he said it was. He further testified that he spoke to her about her present relation with her husband. He was asked just what he said and he answered: "Well, I don't know what particular - I don't know whether I asked her a question - Q, What did you

say? A I don't know what I said, Mr. Meas, particularly."

He was then asked whether he thought it was of any particular importance and he said it was; and then he said he could tell what she said, and he said that what was wanted was what he said, and he then answered, "Well, I don't know as I said anything about that particular matter."

Then counsel asked, "What did you say to her?" and he answered: "There was nothing said, Mr. Meas. She was telling me just what the present situation was with her husband, which I have told from Dr. Meason." He was then asked whether he had made this trip to Cleveland and talked with Mrs. Meason for three quarters of an hour and could not remember what he had said to her other than what he had testified to; and he then replied that there was a good deal more, and he was asked what further conversation he had with her, and he then said he told her he "wanted to know just what the situation was between herself and her husband and the Babblers in order to find out what it meant * * * That was the drift of the conversation." He was then asked whether this man, Babler, he had mentioned was the man that was mixed up with Mrs. Meason in the church "at the time you came onto them"; and he answered that he never came onto them and that they were not mixed up together.

He was then asked whether Babler was the man he wanted to talk to Mrs. Meason about that day and he answered, "Well, no, I was not talking about Dr. Babler particularly."

He was then asked if he had stated all that he had said to Mrs. Meason, and he answered, "Yes, the same and the same of all that we talked together."

The foregoing is the only explanation to be found in the record of the incident referred to. When Dr. Case, charged as a co-respondent in this case, the trial of which had been going on for several days, he having previously testified that he had never had any trouble of any kind in his former location in Buffalo or the one before that, Brooklyn, or the ones before that, learned that counsel for the defendant was leaving the following day for the east to investigate these matters; he certainly did not hurry away that very night to confer with former parishioners, and then go to Cleveland to look up Mrs. Bacon, who, with her husband had been in his Buffalo church, but who had been estranged from her husband at this time ^{was} ~~an~~ living apart from him in Cleveland, and have an hour's conference with her, unless it had something to do with him. If it did not, the occurrence, in our opinion, called for an unquestionably frank and clear explanation. We have searched this record to find such an explanation but it is not there. The testimony above referred to is all there is from Dr. Case, to explain why he made this trip to see Mrs. Bacon. He was asked whether he had gone down to New York to confer with friends to see what, if anything, they could do for him, and he said that that was not it but that he had gone particularly to see a Mr. Holcomb (who lived in Brooklyn) "and to see that arrangements should be made for sufficient men to come here and give testimony for me at the trial and also to get the church records all together."

Apparently when counsel for the defendant was in the east taking depositions, he learned of an incident which involved another charge of adultery against the co-respondent in

this case, with a woman named Adams. After counsel had returned to Chicago and the hearings of this case had been resumed, and Dr. Case was again on the witness stand, he was asked a number of questions which brought out the fact that one of his class-mates in college, ^{man} was Dr. J. J. Adams, who had also become a minister; that while Dr. Case was located in Brooklyn he frequently visited in the Adams home; and further, that Dr. and Mrs. Adams had a son. At this point in the examination Dr. Case was excused from the stand and the son of Dr. and Mrs. Adams was called as a witness. While the testimony he gave was incompetent, in part, at least, it was received in evidence without objection. He testified that his father had procured a divorce from his mother on the ground of adultery; that he had talked with his mother with regard to her infidelity and that she had mentioned to him the names of five men with whom she had sustained improper relations; that this period of time had covered a period of fifteen years, and that one of the five men his mother named was the co-respondent in the case at bar, whom he identified in the court room and whom he testified he had seen visiting in his home in Brooklyn during the time Dr. Case lived there.

After the testimony of this witness had been given, Dr. Case again resumed the witness stand, and, in the course of his examination, raising questions which showed that he had never been charged with having committed adultery with any woman above referred to, and he answered that he had been, and that that accusation was contained in a letter he had received from Dr. Adams, saying that his wife had made a confession to him, and demanding \$2,500 "or else I will be exposed."

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Dr. Case testified, "I did not answer it at all, because I did not understand it." He then testified that he received a second letter, wanting to know why he had not answered the first one, and that he then consulted a lawyer and through the latter wrote Dr. Adams saying that he did not intend to be blackmailed. Dr. Case denied ever having had any improper relations with Mrs. Adams. He produced a witness who testified that he had seen the letter from Dr. Adams to Dr. Case, containing the accusations involving Mrs. Adams, and demanding \$2,500.

In the course of the examination which brought out these facts the Chancellor commented upon the incompetency of some of the testimony and the fact that, in part at least, it was "needfully scarce." While these comments were justified, it must also be said that Dr. Case himself opened the door to this line of inquiry, and it is hardly surprising that counsel for the defendant took advantage of it. Again it should be noted that all this evidence was received without objection.

While cross-examining Dr. Case in connection with the testimony on this matter, counsel for the defendant asked, "Why, Doctor, you have already stated, have you not, on my former cross-examination of you, that no one at any time or place ever raised any question or made any suggestion that your relations with _____ other than your wife, were not entirely proper? To that question Dr. Case answered, "No. I think you asked the question as to whether I had any trouble in any church before." That sort of a distinction under all the circumstances, is something we would hardly

expect to find, coming from an innocent man, willing and anxious to be entirely frank about all the facts. The previous question which apparently both counsel and Dr. Case had in mind, viz., in fact, as Dr. Case remembered it, for the record shows that counsel had previously asked Dr. Case, "About your experiences as a pastor, where women of your congregation have come to you to tell of their own troubles and their own life worries and things of that kind," and counsel had asked him, "To place the ordinary man of the world with a woman not his wife, under those conditions, do you regard that as an ideal condition for a man of the world to be placed in?" and he said that he did not consider that there was anything unusual in it. He was then asked this question, "You never, as a minister of the Gospel, with women coming to you, at your study, have ever been placed under a condition that would tend to arouse the passion of a man, the sex passion?" and he answered, "No, I have never had any such experience."

Possibly, when Dr. Case told counsel for the defendant that he thought that the question he had previously put to him was "as to whether I had had any trouble in any church before," he had in mind the questions that had been put to him previously by asking again, viz., when Dr. Case first went on the stand, brought out the various churches he had been connected with during his life as a minister, and in connection with the first one, the First Church, he said, "Did you have any trouble there of any kind?" which Dr. Case answered in the negative. Under questions which were put to him with reference to each of the churches

ing questions, by asking which, were answered in the same manner.

But another incident occurred in the course of the trial, as disclosed by the record, during the cross-examination of Dr. Gave, by counsel for the defendant, which in our opinion includes testimony, the substance of which was flatly contradictory of and inconsistent with his later testimony with regard to the fact that he had previously been charged with improper relations with Mrs. Adams.

was mentioned, together with others. As a circumstance which inevitably tends to materially discredit the correspondent in this case, its effect, necessarily, is to corroborate the defendant, although indirectly.

Citation of authority is not necessary on the proposition that where, in the opinion of this court, the decree of the Chancellor in a case of this kind is against the clear and unalloyed weight of the evidence, it must be reversed. That was the action of this court in Wideman v. Wideman, 215 Ill. App. 337, and the Supreme Court in Miller v. Miller, 107 Ill. 376. The Miller case was a suit for divorce on the charge of adultery. After hearing all the testimony, the Chancellor dismissed the complainant's bill for want of equity, and that decree was affirmed in the Appellate Court, but on appeal on review of the evidence, the Supreme Court reversed the decisions of both trial and Appellate Courts on the facts.

We have examined all the testimony on this record with great care. We have indulged every possible inference and presumption in favor of innocence. In view of all the circumstances involved in this case, we deplore the necessity of reversing the decree entered by the Chancellor, but we have been unable to escape the conviction that that decree is clearly against the unalloyed weight of the evidence. We have set forth the facts and the reasons, which, in our opinion, compel the reversal of the decree, at a length which may

-11-

only be justified by the unusual and unfortunate circumstances involved. The decree of the Superior Court is reversed and the cause remanded to that court with directions to enter a decree as prayed for in the bill of complaint.

RECORDS REVIEWED AND CASES REMANDED WITH DIRECTIONS.

JUL 1 1904

O'CONNOR, P.J. AND SAYLER, J. CONCUR.

102 - 39511

456A
FRANK ZIEGELE, Administrator
of the Estate of Susanna Ziegele,
Deceased,

Plaintiff in Error,

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

JOHN THOSE and LILLIAN THOSE,

Defendants in Error.

238 I.A. 619⁴

Opinion filed June 17, 1925.

MR. JUSTICE THOMSON delivered the opinion of
the court.

By this writ of error the plaintiff, Frank Ziegele, seeks to reverse an order of the Municipal Court of April 26, 1924, vacating a judgment which had previously been entered against the defendants and in favor of the plaintiff, on February 4, 1924, and reinstating the cause. It will be seen that the order appealed from vacated a judgment of the court, which had been entered more than thirty days prior thereto. The order was entered on a petition filed by the defendants, pursuant to the provisions of Section 21 of the Municipal Court Act. By their petition the defendants set up that they have a good defense upon the merits to the whole of the plaintiff's claim; that they employed counsel to represent them in the case and filed an affidavit of merits; that when the cause was put at issue, it was set for hearing on January 30, 1924, and that no further order was ever entered setting it for hearing, but that the cause was procured by the plaintiff to be called and tried ex parte in the absence of the defendants and without their knowledge and without the knowledge of their attorney.

103 - 29511

FRANK ZIEGELE, Administrator
of the Estate of Susanna Ziegele,
Deceased,

Plaintiff in Error,

v.

JOHN THOSE and LILLIAN THOSE,

Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 619

Opinion filed June 17, 1925.

MR. JUSTICE THOMSON delivered the opinion of
the court.

By this writ of error the plaintiff, Frank Ziegele, seeks to reverse an order of the Municipal Court of April 26, 1924, vacating a judgment which had previously been entered against the defendants and in favor of the plaintiff, on February 4, 1924, and reinstating the cause. It will be seen that the order appealed from vacated a judgment of the court, which had been entered more than thirty days prior thereto. The order was entered on a petition filed by the defendants, pursuant to the provisions of Section 21 of the Municipal Court Act. By their petition the defendants set up that they have a good defense upon the merits to the whole of the plaintiff's claim that they employed counsel to represent them in the case and filed an affidavit of merits; that when the cause was put at issue, it was set for hearing on January 30, 1924, and that no further order was ever entered setting it for hearing, but that the cause was procured by the plaintiff to be called and tried ex parte in the absence of the defendants and without their knowledge and without the knowledge of their attorney.

1150 - 1151

RECEIVED, CIVIL SERVICE
OFFICE OF THE SECRETARY OF THE ARMY
WASHINGTON

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Opinion filed January, 1935.

See no. 2100 and no. 2101 for further details.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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THE UNIVERSITY OF CHICAGO PRESS

THE UNIVERSITY OF CHICAGO PRESS

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For any new source not previously certified to standards as above

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and attached to the wall of the chamber.

The writer and an official will be returning to the same place.

THESE ARE THE RESULTS OF THE RESEARCH CONDUCTED BY THE RESEARCHERS OF THE INSTITUTE OF THE HISTORY OF THE ACADEMY OF SCIENCES OF THE USSR.

The petition further set up that the half-sheet containing the record of this cause shown that the cause was set for hearing on January 30, and that no order was entered in the cause on that date, setting the cause for hearing on February 4, nor for any other day, and that defendants had no means of ascertaining by what means a hearing of the cause was procured; that their counsel examined the bulletin each day through an employee regularly employed by them to watch the course of cases upon the various calendars, "but by accident, or mistake, the fact that said cause was noted in the law bulletin on the trial call, escaped the observation and knowledge of the said attorneys and their said employee, although diligently endeavoring to keep informed as to the condition of the calendar."

There appear as exhibits and incorporated in the bill of exceptions, copies of the Daily Municipal Court Record, published by the Law Bulletin Publishing Company of Chicago, of January 29, 30 and 31 and February 1 and 2, 1924. These issues give a list of the cases by name and number which were set for trial before the various Municipal Court judges on the next court day. The record of January 29, 1924, shows the case at bar on the trial calendar of Judge Holmes for January 30th, the day when it had been set for trial. The record for January 30, shows the case on the call of the same judge for the following day. The record for January 31, gives a call of contested motions to be held by Judge Holmes on February 1. The record for February 1, gives a call of set cases for Judge Holmes for the following day, and the case at bar again appears in that list of cases pending for trial before Judge Holmes. The record

for February 2, which was Saturday, shows the same condition on Judge Holmes' call, the same case still on trial with the case at bar appearing as the fourth case in the list of set cases being held for trial Monday, February 4. It appears from affidavits submitted in opposition to the defendants' petition, that the plaintiff was in court with his lawyer and witnesses on January 30, the date on which this case was set for trial, and the case not being reached and going over from day to day, the plaintiff continued to attend with his lawyer and witnesses, until the cause was reached on February 4, in the regular way, when he presented his proof, and judgment in his favor was entered for the sum of \$1387.30, the amount of his claim, with interest. The plaintiff's affidavits did not traverse any of the allegations set up by the defendants in their petition.

The order appealed from, vacating the judgment entered more than thirty days prior thereto and reinstating the cause, pursuant to the petition of the defendants, filed under section 21 of the Municipal Court Act, was a final appealable order. A. L. Clark & Co. v. Charles Levy Co., 219 Ill. App. 686, and cases there cited and reviewed; Gramer v. The Ill. Commercial Men's Assn., 261 Ill. 516; Harris v. The Chicago House Wrecking Co., 314 Ill. 500.

The petition to vacate involved in the first case cited, was very similar to the one involved in the case at bar. As we said there, repeating what we had previously said in another similar case, American Surety Co. of New York v. Bliss, 214 Ill. App. 463, the law is well settled that a judg-

ment will not be set aside after the time fixed by the statute for so doing, unless it is made to appear not only that the petitioning defendant had a meritorious defense, but also that the judgment was in no manner caused by any lack of diligence on his part. In our opinion, it is entirely clear, from the face of the petition of the defendants, that there was lack of diligence on their part in this case. The case was at issue and had been set for trial on January 30. On that date it was on one of the regular trial calls of the Municipal Court, and so appears from the regular published list of such court calls, in the Daily Municipal Court Record. The cause not being reached for trial that day, by reason of the time consumed in hearing other cases ahead of it on the call, it was held on that call by the court, from day to day until it was reached, as is always the case in such situations. It was published in the Daily Municipal Court Record on the call of the same judge, from day to day until it was regularly reached for trial. Under such circumstances, the petition of the defendants did not show diligence, and therefore the trial court erred in allowing the petition and in entering the order appealed from.

The order of the Municipal Court is therefore reversed and the cause is remanded to that court with directions to reinstate the judgment which was vacated by said order.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

O'CONNOR, P. J. AND TAYLOR, J. CONCUR.

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, stuffy interior. I looked up at the sky, which was a pale, hazy blue. The sun was just starting to rise, and its light was filtering through the clouds. I took a deep breath and felt a sense of peace. The world was so quiet, and I was alone. I walked towards the beach, my feet sinking into the soft sand. The waves were gentle, and the sound of them crashing against the shore was soothing. I closed my eyes and let the sun warm my face. It was a perfect moment, and I wanted to savor it.

409 - 29826

FORD ROOFING PRODUCTS COM-
PANY,

Appellee,

v.

ILLINOIS SMELTING & REFIN-
ING COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 620¹

Opinion filed June 17, 1925.

MR. JUSTICE THOMSON delivered the opinion of
the court.

By this appeal, the defendant, Illinois Smelting
& Refining Company, seeks to reverse a judgment for \$352.50
recovered against it by the plaintiff, Ford Roofing Products
Company, in the Municipal Court of Chicago.

The plaintiff's statement of claim set forth that it
had ordered two cars of paper from the defendant at \$3.25 per
ton; that the defendant accepted the order and agreed to ship
immediately; that the defendant failed to ship the paper as
agreed; that the market price of the paper increased and the
plaintiff was compelled to buy paper on the market at the
prevailing market price of \$30 per ton; that two cars contained
thirty tons, for which the plaintiff was compelled to pay \$600,
to its damage in the sum of \$502.50. That statement set forth
a good cause of action. The contract declared upon as the basis
of the action called for thirty tons of paper at \$3.25 per ton.
It therefore was a contract for the sale of goods of the value
of less than \$500.00 and was, therefore, not within the pro-
vision of the statute of frauds which provides that a contract

for sale of goods of the value of \$500 or upwards shall not be enforceable by action unless the buyer accepts part of the goods and actually receives the same, or gives something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is signed by the party to be charged or by his agent.

In proving up its case, the plaintiff proved a contract in writing. That did not constitute a variance, as claimed by the defendant. The statement did not allege an oral contract.

The affidavit of merits interposed by the defendant in this case alleged that the defendant did not accept the plaintiff's order nor agree to ship the paper in question but stated that, as a condition precedent to the acceptance of the order, the defendant insisted on prepayment of the freight, which condition the plaintiff refused to comply with and for that reason the paper was not shipped. Further, the defendant denied that the market price of the paper advanced to \$20 per ton or that the plaintiff was damaged as alleged. On the trial the defendant sought to prove that after the date of the alleged contract, a representative of the defendant had two conversations with the purchasing agent of the plaintiff, who had entered into the contract in behalf of the plaintiff and that in these conversations, the plaintiff's agent repudiated the contract and stated that the plaintiff "would not have paper of that kind at any price." The trial court did not err in sustaining plaintiff's objections to that line of proof as it was not within the defenses set up by the defendant in its affidavit of merits.

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1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy.

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It is contended further by the defendant that there is not sufficient proof of damages in the record; that there is no evidence as to what kind of paper the plaintiff purchased in the market, by reason of the alleged breach of contract by the defendant nor of its market price. The man who was the purchasing agent of the plaintiff at the time of this contract, testified that on September 24, 1921, (the contract called for shipment on September 7, 1921) he purchased paper of the kind referred to in the order and that he paid \$16 per ton for it. The contract called for two cars of paper "F.O.B. Rock Island, Illinois." The witness referred to, testified that "the fair and reasonable market price of paper, such as this, per ton, F.O.B. Rock Island, Illinois, on September 24, 1921," was \$16.00 per ton. This contract was for immediate delivery. When the defendant failed to deliver, the plaintiff had the right to go into the market and buy at the market price and in such event hold the defendant for the difference between that price and the contract price.

We find no error in the record. The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

It is important to note by the following that

there is no sufficient proof of identity in the present

case that in no instance has it been shown that

plaintiff's position in the matter is such as to entitle

him to recovery of the amount of the money claimed

The law now and the testimony of the plaintiff at the

time of his complaint, justified him in recovering the

(The complaint failed for failure to establish a right)

in recovery of the money claimed in the present case

that he was not the owner of the property claimed for

the money claimed in the present case, Illinois, the present

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GARRIE BRENNISH,
Plaintiff in Error,

vs.

ESTHER HORVATZ,
Defendant in Error.

4566a
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

238 I.A. 620²

MR. PRESIDING JUSTICE McSURNELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff questions a judgment of nisi capiat entered upon verdict after trial before a jury in the Circuit court.

The judgment must be affirmed for the reasons that nowhere in the bill of exceptions does there appear any motion for a new trial, the ruling of the court thereon, or any exception thereto, neither does the bill of exceptions show any motion in arrest of judgment or any ruling thereon, nor does it show in any way that plaintiff excepted to the judgment. Such matters must appear by a bill of exceptions and recitals by the clerk in the law record do not cure the defect of failing to state these in the bill of exceptions. C. B. Young v. Wells Glass Co., 37 Ill. App. 537; Hix v. Malin, 139 Ill. App. 438. The record therefore does not present for our decision the questions argued by the plaintiff in error.

The judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

CHAS. HARRIS
 Plaintiff in error,
 vs.
 JAMES HARRIS,
 Defendant in error.

THIS CASE BEING
 AT THE COURT.

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IN SENATE

REPORT OF THE

OF THE COMMISSIONERS OF THE LAND OFFICE
 IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
 ON THE 11TH MARCH 1891.

THE FOLLOWING ARE THE NAMES OF THE MEMBERS

WHO WERE PRESENT AT THE MEETING OF THE COMMISSIONERS

ON THE 11TH MARCH 1891, AND THE NAMES OF THE MEMBERS

WHO WERE ABSENT THEREFROM.

THE NAMES OF THE MEMBERS WHO WERE PRESENT AT THE MEETING

ON THE 11TH MARCH 1891, AND THE NAMES OF THE MEMBERS

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THE NAMES OF THE MEMBERS WHO WERE PRESENT AT THE MEETING

ON THE 11TH MARCH 1891, AND THE NAMES OF THE MEMBERS

WHO WERE ABSENT THEREFROM.

PLAINTIFF IN ERROR.

THE DEFENDANT IN ERROR.

CHAS. HARRIS.

CHAS. HARRIS, Plaintiff in error.

WALTER E. HELLER & COMPANY,
a Corporation,
Defendant in Error,

vs.

PAUL H. KOLB,
Plaintiff in Error.

4567a
WRIT OF ERROR TO THE MUNICIPAL COURT
OF CHICAGO.

238 I.A. 620³

MR. PRESIDING JUSTICE McSURNLY
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of a judgment against him of \$500, in an action of trover, for an automobile. He claims that the car in his possession is not the one to which plaintiff is entitled. The case was tried by the court and the evidence sufficiently supported its finding against defendant.

Plaintiff was the owner and holder of a note dated July 7, 1923, signed by Joseph P. Dixon, secured by a purchase money mortgage on an automobile, which was a seven passenger suburban Cadillac, serial number and motor number 57-66-173. This mortgage was duly recorded July 10, 1923. Dixon defaulted in an installment of the purchase money and plaintiff elected to declare the whole amount due and demanded the automobile of Dixon, who did not have it, as January 29, 1924, it had been taken by defendant under an attachment writ. The bailiff who levied the writ testified that he levied on a seven passenger suburban Cadillac, but says that the garage was dark and the numbers dirty so that he could not tell whether the numbers were "57-66-173" or "57-66-175;" that subsequently he learned that he had mistakenly read the letters "66" instead of "60" and thus erroneously described the automobile in his inventory; that there was no other

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Cadillac belonging to Dixon in the garage at the time of the levy. In April there was a sale of the attached car and it was bought by defendant and another party and immediately taken to McHenry county, where defendant's wife lived. The possession of this car by defendant is admitted.

Dixon testified that he owned only one Cadillac car, which was the one described in the chattel mortgage; that he afterwards saw defendant's wife driving this car. Other witnesses testified, giving the character and detailed description of the car and amply established the fact that the car in possession of defendant was the same car described in the chattel mortgage.

If this is not the fact, plaintiff could easily have shown it by submitting the car in his possession to inspection, and the correct number could be ascertained without question. He did not do this but apparently had the car beyond the jurisdiction of the court. This at least creates a presumption against his defense.

A number of points have been argued by respective counsel, but the case turns upon the identity of the automobile in question and this was established by the evidence.

The judgment is proper and is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

E. LEONE IRWIN,
Plaintiff in Error,

vs.

GLYNN J. ELLIOTT, Ex'r., etc.,
Defendant in Error.

ERROR TO SUPERIOR COURT OF
COOK COUNTY.

238 I.A. 620⁴

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by E. Leone Irwin, the defendant, from a decree in favor of the complainant, Glynn J. Elliott, conservator of the person and estate of James Tattersfield, an incompetent person.

The material allegations of the complainant are as follows:

"That he is the duly appointed, qualified and acting conservator of the person and estate of James Tattersfield, an incompetent person. That your orator's said ward is a bachelor about seventy years of age and that for some time prior to the month of May, A. D. 1922, he resided at No. 662 Diversey Boulevard, in the City of Chicago, in said county, as a lodger in the boarding house there conducted by E. Leone Irwin, hereafter made defendant hereto. That your orator's ward by reason of his old age, feebleness and failing mental faculties was not then nor has he since been capable of transacting business or managing his affairs and was easily influenced by those with whom he associated; that the said E. Leone Irwin in the course of her attendance upon your orator's ward and in supplying his wants discovered that he was so susceptible to influence, and thereupon said E. Leone Irwin by demonstration of feigned affection and by representations that she was in poverty and in dire need of money in order to save her home from being foreclosed and by threats to commit suicide, if your orator's ward should not assist her financially, acquired an undue influence over your orator's ward and fraudulently induced your orator's ward to make gifts to her as follows: During the month of May, A. D. 1922, the sum of Thirty dollars (\$30.00), during the month of June, 1922, the sum of one hundred dollars (\$100.00), during the month of July, 1922, the sum of two hundred dollars (\$200.00) and during the month of August or September, 1922, the sum of two hundred dollars (\$200.00) and during the month of November, 1922, the sum of three hundred dollars (\$300.00). That said E. Leone Irwin was not in poverty and did not require said sums to save her home and that each of said gifts was obtained from your orator's ward by said E. Leone Irwin by fraudulent exercise of undue influence which said E. Leone Irwin had acquired over your orator's ward.

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"That during the months of October and November, 1922, your orator's ward was suffering from lung fever and was feeble both mentally and physically. That by reason of his condition, mental and physical, the said E. Leone Irwin by the said means above described and by representing that a payment was then due on a mortgage on the premises owned and occupied by her, induced and persuaded your orator's ward on the twenty-sixth day of October, 1922, to make a loan to her in the sum of Fifteen hundred dollars (\$1500.00) and by like means induced your orator's ward to make a further loan to her on the sixth day of November in the sum of Thirty-five hundred dollars (\$3500.00). That there were no such payments due on the premises occupied by said E. Leone Irwin and that said E. Leone Irwin indulged in protestations and demonstrations of pretended affection for your orator's ward and feigned an intention to commit suicide for the purpose of extorting money from your orator's ward and that said loans and the gifts above set forth were not made by your orator's ward of his own free will but were induced by the false representations of the said E. Leone Irwin and by her exercise of an undue influence over your orator's ward. That said E. Leone Irwin, upon procuring your orator's ward to make the gifts and loans recited, from time to time deposited the moneys so secured to her credit in the Lakeview State Bank and as your orator is informed and believes, and therefore so states the fact to be, that a substantial balance of said moneys still remains in the hands of said Lakeview State Bank to the credit of the said E. Leone Irwin. That your orator is informed and believes and therefore so states the fact to be, that said E. Leone Irwin has applied certain sums of money so secured by her from your orator's ward toward the purchase by her of the following described real estate: Lot 7 in L. J. Halsey's Subdivision of Lot 9 in Bickerdike and Steele's Subdivision of West $\frac{1}{4}$ North West $\frac{1}{4}$ of section twenty-eight (28), Township forty (40) North, Range fourteen (14) East of the Third principal meridian, situated in the City of Chicago, County of Cook and State of Illinois. That by reason of the fraud and undue influence whereby said E. Leone Irwin acquired said sums of money so secured by her from your orator's ward, the said Leone Irwin holds the unexpended balance of said moneys as trustee for your orator as conservator as aforesaid, and your orator is entitled to have said balance paid to him; that the said E. Leone Irwin also holds her equity in the real estate above described as trustee for your orator, as conservator, as aforesaid, to secure the return to him of all money so as aforesaid by her obtained from his said ward, with lawful interest thereon.

"Whereas, therefore, as your orator is without remedy in the premises, save in a court of equity, your orator brings this, his bill of complaint, and makes the said E. Leone Irwin and Lakeview State Bank, a corporation, parties defendant thereto, and prays that they may be required to make full and direct answer hereto, but not under oath, the answer under oath being hereby expressly waived; and that the said E. Leone Irwin may more especially be required to answer or set forth in what manner she has disposed of the sums of money so by her secured from your orator's ward, and in what property she has invested the same or any part thereof, stating the amounts and the terms and particulars of all such investments, and that the said Lakeview State Bank may more especially be required to answer or set forth the dates and amounts of money deposited with it by said E. Leone Irwin subsequent to May 1st, A. D. 1923, the amounts and dates of all withdrawals by her since then made, and the

[illegible]

amount of the balance still remaining in its hands to the credit of said E. Leone Irwin.

"Your orator further prays: That this court will ascertain, determine and decree: (a) the total amount so secured by said E. Leone Irwin from your orator's ward and the lawful interest thereon, and that your orator is entitled to the return thereof, (b) the amount thereof now in the hands of said Lakeview State Bank, (c) the disposition made by said E. Leone Irwin of the remainder thereof, including the manner in which the same has been invested and the properties or interests now held by said E. Leone Irwin, as a result of the investment thereof, and that said E. Leone Irwin holds such properties and interests as trustee for your orator as such conservator. That said Lake View State Bank may be decreed to pay to your orator the balance now in its hands of the deposits by said E. Leone Irwin, with it of funds so secured by her. That said E. Leone Irwin may be decreed to pay your orator the entire amount so secured by her, with lawful interest thereon and the costs of this suit, less any amount so remaining deposited to her credit which may be decreed to be paid to your orator by said Lake View State Bank. That the amount determined by this court to have been by said E. Leone Irwin invested in the real estate above described or any other property out of the moneys by her secured from your orator's ward may be decreed to be a lien on all her interest in and to said described real estate and such other property in which said moneys may have been invested, and that in default of her repaying such amounts to your orator with lawful interest thereon within a short day to be fixed by the court, all her interest in and to said real estate and any other such property may be sold, as may be directed by this court to satisfy the amounts so by her invested in said real estate and such other property out of the moneys secured by her from your orator's ward together with interest thereon and the costs of this suit; and that in case of such sale, and of the failure of the said E. Leone Irwin to redeem therefrom pursuant to statute, that she and all persons claiming through or under her subsequent to the commencement of this suit may be forever barred and foreclosed from and to all right and equity of redemption in and to said real estate and any other property so decreed to be sold. That your orator may have execution against the said defendant E. Leone Irwin, for any balance that shall remain due to your orator, of principal, interest and costs, if the sale of said real estate and such other property fails to produce money sufficient to pay the whole of said principal, interest and costs."

The answer of the defendant denied all of the material allegations of the bill. The answer neither admitted nor denied that the complainant was the qualified and acting conservator of the person and estate of James Tattersfield.

The court entered a decree in substantial conformance with the prayer of the bill. The pertinent parts of the decree are as follows:

"That the allegations contained in said bill of complaint are true as therein stated, and that the equities of this cause are with the complainant, and that there is now due from the defendant to the complainant, as conservator of the estate of James Tattersfield the sum of Fifty-eight Hundred Dollars (\$5800.00) with interest from March 15, 1923, at 5 per centum per annum. That during the months of October and November, A.D. 1922, the said James Tattersfield was feeble both mentally and physically, and that said E. Leone Irwin, by demonstrations of feigned affection, and by representations that she was in poverty and in dire need of money in order to save her premises herein-after described from being foreclosed, and by threats to commit suicide, induced and persuaded the said James Tattersfield at said times to make loans to her in the sum of Fifty-eight Hundred Dollars (\$5800.00) in order to pay pretended loans claimed to be then due upon the said premises. That there were no such amounts due on any loans upon the said premises and that said James Tattersfield made said loans to said defendant without his own free will but by reason of the false representations made by E. Leone Irwin and by the exercise of her undue influence over the said James Tattersfield. That thereafter, and on November 25, 1922, the said E. Leone Irwin used and applied the said sums of money so loaned to her as aforesaid, upon the purchase of the said premises (here follows description) and thereupon, on said date, received a deed in her name to said premises. That by reason of the fraud and undue influence whereby said E. Leone Irwin acquired said sums of money from said James Tattersfield, the said E. Leone Irwin holds her title to said real estate above described as trustee for the complainant as conservator as aforesaid, to secure the return to him of the money so advanced to her by said James Tattersfield. That the complainant herein is entitled to a lien upon the real estate above described to secure the payment of said sum of Fifty-eight Hundred Dollars (\$5800.00) with interest from March 15, 1923, at 5 per centum and in the event of the failure of said E. Leone Irwin to pay said indebtedness, is entitled to have said real estate sold and the proceeds of said sale applied to the satisfaction of said indebtedness.

It is, therefore, ordered, adjudged and decreed that the defendant, E. Leone Irwin, pay to the complainant herein within thirty (30) days from this date, the sum of Six Thousand and Sixty-five Dollars and Eighty-five Cents (\$6065.85) with lawful interest to be computed thereon from this date until paid, and also the costs of this suit to be taxed by the Clerk of this court. That the indebtedness of said E. Leone Irwin in the said sum of Six Thousand and Sixty-five Dollars and Eighty-five Cents (\$6065.85) shall be and the same is hereby expressly decreed to be a lien upon the said following described real estate situated in the City of Chicago, County of Cook and State of Illinois: (Here follows description of property.)

There is no certificate of evidence in the record.

The only question to be determined is whether the decree contains a finding of facts sufficient to warrant the decree.

It is contended by counsel for the defendant that the findings of fact in the decree are wholly insufficient to support the

decree. The specific objections of counsel for the defendant to the decree are as follows:

"(1) that the complainant in this case has any interest whatsoever in the cause here presented; or (2) that the complainant in this case is or ever has been the conservator of the person or property of the said James Tattersfield; or (3) that said James Tattersfield was an incompetent person; or (4) that said James Tattersfield had ever been adjudged an incompetent person by a court of competent jurisdiction; or (5) that this defendant, through fraud or otherwise, at any time or place ever secured any sums of money whatsoever or other property from said James Tattersfield; or (6) that said James Tattersfield or the complainant in this cause has or ever had any interest whatsoever in the real estate described in the decree."

The general rule applicable to a case such as the one at bar is stated in the case of Hoch v. Arnold, 242 Ill. 208, as follows (pp. 209, 210):

"It is necessary to the validity of a decree granting relief that the record shall show the facts warranting the decree. It is not, however, necessary that all the evidence by which the facts were proved should be set forth in the record. If it appears that the court on the evidence before it found the ultimate facts justifying the relief granted, it is sufficient. The decree need not recite subsidiary or evidentiary facts tending merely to sustain the ultimate conclusion of fact upon which the decree is founded. A general finding of the fact is enough, and it is not necessary to find minutely all the circumstances tending to sustain the general finding, for these circumstances are matters of evidence only."

The decree contains this finding: "there is now due from the defendant to the complainant, as conservator of the estate of James Tattersfield, the sum of Fifty-eight Hundred Dollars (\$5800) with interest." The decree also finds that the defendant "holds her title to said real estate above described as trustee for the complainant as conservator as aforesaid." We think that these findings are sufficient to show that the complainant is interested in the case as the conservator of Tattersfield.

Although the decree does not specifically find that Tattersfield was an incompetent person, we are of the opinion that such a conclusion of fact is inferable from the findings that he "was feeble both mentally and physically" and that the complainant was conservator of his estate.

The decree specifically finds that the defendant by undue influence and false representations persuaded Tattersfield to lend her money at various times to the amount of \$6800.

We are of the opinion that the findings of fact in the decree were sufficient to justify the chancellor in finding that the complainant is entitled to a lien upon the real estate acquired by the defendant by undue influence over Tattersfield and false representations to him. The money so obtained by the defendant equitably belonged to Tattersfield, and in purchasing the real estate with the money, the defendant was, in legal effect, using the money of Tattersfield. The rule is that:

"if one person buys land with the money of another, even though there is no fiduciary relation, and takes the title in his own name, there is a resulting trust, and the legal title is a mere naked form, and only evidence of title in favor of the cestui que trust, because his money paid for it." 26 R.C.L. Section 73, pp. 1227, 1228.

For the reasons stated the decree of the chancellor is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

The second important thing that we should mention is that the Indians and their governments should be treated as equals and not as subjects. It is not only a matter of justice but also of practicality. If we do not treat them as equals, they will not be able to develop and progress.

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KEEFIELD-LEACH COMPANY,
Appellant,

vs.

INDUSTRIAL PUBLICATIONS, Inc.,
Appellee.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

238 I.A. 620

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Kenfield-Leach Company, the plaintiff, from a judgment on a verdict in favor of the Industrial Publications, Inc., the defendant, in an action brought by the plaintiff on a written contract between the plaintiff and the defendant. In the action, as originally brought, Harold W. Rosenberg was made a defendant, but the action was dismissed as to him.

The contract was made with Rosenberg, but all of the obligations of the contract were subsequently assumed by the defendant. The plaintiff was engaged in the printing and publishing business, and published two trade publications known as "Brick and Clay Record" and "Building Supply News." Rosenberg was a stockholder, officer and director in the plaintiff company. Rosenberg entered into a contract with the plaintiff to purchase the two publications, "Brick and Clay Record" and "Building Supply News." By the terms of the contract, set forth in paragraph 6, Rosenberg agreed to give the plaintiff for a period of eight years from June 1, 1920, the work of typesetting, printing, binding and mailing the two publications with the provision that Rosenberg or his assigns should have the right at any time, upon giving thirty days notice to the plaintiff, to withdraw the work, or any part thereof, from the plaintiff by paying the plaintiff at the rate of \$1000 each year for each publication for the unexpired portion of the eight years. The contract also provided, in paragraph 7, that

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THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C.

This is to certify that the following is a true and correct copy of the original as it appears in the records of the Bureau of Land Management, Department of the Interior, at Washington, D. C., and that the same is a true and correct copy of the original as it appears in the records of the Bureau of Land Management, Department of the Interior, at Washington, D. C., and that the same is a true and correct copy of the original as it appears in the records of the Bureau of Land Management, Department of the Interior, at Washington, D. C.

Rosenberg might withdraw the work from the plaintiff if the price charged by the plaintiff was 20% or more in excess of the price charged by three or more responsible printing concerns in the city of Chicago doing similar work.

Under a provision in the contract granting to Rosenberg the right to sell and assign the publications to a corporation to be organized by him, Rosenberg sold and assigned the two publications to the defendant corporation.

Rosenberg withdrew the work from the plaintiff.

The principal question in the case is whether Rosenberg exercised his right to withdraw the work under paragraph 8 of the contract or paragraph 7.

Paragraph 8 is as follows:

"Should the party of the second part sell or dispose of said two publications or either of them in such manner as will effect a withdrawal of said work or any part thereof from first party, and second party shall not have previously withdrawn said work from first party by reason of any of the matters contained in and set forth in Paragraph Seventh hereof, second party agrees to pay to first party at the rate of One Thousand Dollars (\$1,000) each year for each publication for the unexpired or remaining portion of said eight (8) years; but it is agreed that said second party shall have and is hereby granted the right to sell and dispose of said publications or either of them to a corporation or individual; and if the purchaser thereof agrees in writing to assume the obligations of this contract as respects said work of typesetting, printing, binding and mailing, as aforesaid, then such assumption of said obligations shall operate to release second party from his obligation to make the payments hereby contemplated; but provided only that the first party shall have signified in writing that such purchaser is entirely satisfactory to first party. Said second party shall have and he is hereby given the option at any time, upon giving thirty (30) days notice to first party, to withdraw said work or any part thereof from first party, by paying to first party at the rate of One Thousand Dollars (\$1,000) each year for each publication for the unexpired or remaining portion of said eight (8) years."

The pertinent part of paragraph 7 is as follows:

"Second party does hereby give and grant unto said first party, for the period of eight (8) years from and after June 1, 1930, the work of typesetting, printing, binding and mailing the said two publications, provided the price charged by first party for such work shall at no time be greater than the lowest amount charged by first party during the same period to either of its

...the ... of ... and ...

[illegible]

the contract of purchase.

and received the right to withdraw the car upon payment of the

The vehicle was in the name of Robert Foster

Blackburn, who was the plaintiff.

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR ENDING 31st MARCH 1906

The following statement shows the progress made during the year in the disposal of the land reserved for the Government by the Land Act, 1897, and the Land Act, 1902.

The total area of land reserved for the Government was 1,000,000 acres at the end of the year ending 31st March 1906. The total area of land disposed of during the year was 100,000 acres. The total area of land remaining to be disposed of at the end of the year was 900,000 acres.

The following statement shows the progress made during the year in the disposal of the land reserved for the Government by the Land Act, 1897, and the Land Act, 1902.

The total area of land reserved for the Government was 1,000,000 acres at the end of the year ending 31st March 1906. The total area of land disposed of during the year was 100,000 acres. The total area of land remaining to be disposed of at the end of the year was 900,000 acres.

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customers for like work. Second party shall have and is hereby granted the right, at his option, to permanently withdraw said work from said party of the first part -

(1) - (a) Should the business of first party be terminated for any cause; or

(b) - be interrupted or suspended for a continuous period of time extending over six (6) months by reason of fire, strikes or other like causes; or

(2) Should second party ascertain that the price charged by first party for the said work is twenty per cent. (20%) or more, in excess of the price charged by three or more responsible printing concerns in the City of Chicago doing similar work."

Counsel for the plaintiff maintain that the uncontradicted evidence shows clearly that the defendant elected to withdraw the work under paragraph 3 of the contract; and that the court should have directed the jury to return a verdict in favor of the plaintiff.

We do not agree with the contentions of counsel for the plaintiff. In our opinion the preponderance of the evidence does not show that the defendant withdrew the work under paragraph 3.

Frederick B. Cozzens, president of the plaintiff company, testified on behalf of the plaintiff that after Rosenberg purchased the two publications, "Brick and Clay Record" and "Building Supply News" from the plaintiff in May, 1920, Rosenberg remained in the offices of the plaintiff until the latter part of 1921; that before Rosenberg moved from the offices of the plaintiff he constantly complained that the plaintiff was charging him too much for the printing of the publications; that in February, 1922, he, Cozzens, had a conversation with Rosenberg at Rosenberg's office; that Rosenberg said he had prices from other printers that were considerably lower than the prices that the plaintiff was charging him; that he, Cozzens, told him that the plaintiff was giving the best prices that plaintiff could make; that Rosenberg said that the differences in prices in his favor were such that he felt that he would have to make a change; that he could make a saving of at

least \$5,000 a year, and that he could better afford to pay "as the \$2000 a year" and take the work away than he could "to stay with us;" that there was further talk about the effect of "this \$2000 a year" would have on our income tax, and that Rosenberg asked his, Cozzens's, construction of the contract - whether the \$2000 a year for the unexpired term should be paid all at once or whether it could be paid monthly or yearly; that he, Cozzens, told him that was a legal question, and that he couldn't undertake to state just what the contract meant; that he, Cozzens, told Rosenberg that if he, Rosenberg, could save \$5000, he, Cozzens, did not see how he, Rosenberg, could afford to stay with the plaintiff if he could get the work done satisfactorily elsewhere; that Rosenberg did not at any time prior to the withdrawal of the work say that the plaintiff was charging him more than 20% in excess of prices charged by other printers in Chicago doing similar work; that Rosenberg never said he was going to withdraw the work because the plaintiff was charging him 20% more than other printers were charging; that Rosenberg showed him a letter containing price quotations; that Rosenberg did not state that those prices were 20% less than ours.

Matthew Beaton, the Secretary and Treasurer of the plaintiff company, testified that in the spring of 1922 he had several conversations with Rosenberg regarding prices; that Rosenberg said that he felt that he was entitled to a reduction in the price of his printing; that he had considerable volume; that if he could have the printing done at a little less figure, he would like to remain with the plaintiff, and he asked him, Beaton, to see what he could do about prices; that in another conversation Rosenberg "had a letter" and laid particular stress on the alterations and wanted to get the work itemized; that

Rosenberg suggested several methods of securing a reduction in price of the printing; that he, Beaton, told him that "we had figured his work as closely as possible, and were giving him the best price we could, the lowest price that we were quoting to anybody," and that he, Beaton, did not see how it was possible to make any further reduction; that in another interview about the middle of July, 1922, he, Beaton, told Rosenberg finally, after they had gone over the figures, that it was impossible for them to reduce their prices to him; that Rosenberg said that he would have to take his work away from the plaintiff, and would like to arrange to take the "Building Supply News" away about the first of August, 1922, and the "Brick and Clay Record" about the first of September, 1922; that he, Beaton, told Rosenberg that he, Beaton, was not thoroughly familiar with the contract, but that under the contract as he, Beaton, understood it, Rosenberg was to give the plaintiff thirty days notice; that Rosenberg said he wanted to take away the "Building Supply News" on August 1, 1922; that he, Beaton, said, "All right then date the notice back to the first of July, 1922;" That Rosenberg told him, Beaton, that Cozzens had arranged that this payment of \$1000 a year for each publication would be paid monthly, and that he, Beaton, said that he had no knowledge of that; that Rosenberg said he could afford "to pay us the \$2000 for the two publications and have his work done elsewhere;" that at the time of the withdrawal of the publications Rosenberg did not make any claim or statement that he was withdrawing the work from the plaintiff because the prices charged by the plaintiff were 20% or more higher than those charged by other printers in Chicago; that Rosenberg never in any of the conversations with him, Beaton, stated or claimed that the prices charged by the plaintiff were 20% or more higher than the prices charged by other responsible printers in Chicago.

The first of these is the fact that the
 evidence is not in the form of a
 direct statement of the facts, but
 is in the form of a statement of
 the facts as they appear to the
 witness. This is a very important
 fact, and it is one which must
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 of the facts as they appear to the
 witness. This is a very important
 fact, and it is one which must
 be kept in mind in all cases.

The evidence shows that on July 1, 1922, Rosenberg sent the following letter to the plaintiff:

"We desire to confirm our conversation of this afternoon with your Mr. Beaton relative to our changing printers for 'Building Supply News' - this change to become effective with the first issue in August. We believe it is unnecessary to again express our extreme regret in taking this action, and which our judgment dictates is a move we cannot longer delay.

Yours very truly,
H. H. Rosenberg,
President and Treasurer."

The evidence also shows that on August 1, 1922, Rosenberg sent the following letter to plaintiff:

"Pursuant to our conversation of recent date, we are hereby notifying you that commencing with the first issue in September we will have our publication, 'Brick & Clay Record,' printed elsewhere. Our people will give you instructions regarding electrotypes to be furnished, disposing of cuts and paper stock in due course of time.

"Again assuring you of our appreciation for the many courtesies extended us in the past, and with best wishes, I am,

Yours very truly,
H. H. Rosenberg,
President and Treasurer."

Rosenberg testified on behalf of the defendant that he was President and Treasurer of the defendant company; that in January or February, 1922, he had a talk with Coxzons, in which he told Coxzons that he, Rosenberg, had lower prices from other printers; that Coxzons made some figures and said he did not see how anyone could do the class of work the plaintiff was doing at those prices; that he, Rosenberg, said that if he, Coxzons, would reduce the item of work considerably, it would bring them closer together; that he, Rosenberg, tried to get Coxzons to fix a scale for the author's corrections; that if he, Coxzons, would do that they would be a lot nearer to the prices that he, Rosenberg, was offered by the other people; that Coxzons said that he, Rosenberg, knew from his, Rosenberg's, experience as a printer that these prices were not possible; that he and Coxzons discussed the question whether the other printers

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could afford to do the work for these prices; that he, Rosenberg, told Cozzens that he would like to stay with the plaintiff, but that he couldn't afford to do it, as he could save about \$8,000, which would be \$750 a month on the printing; that he and Cozzens figured the thing out and arrived at different conclusions.

Rosenberg testified further that in February, 1922, he had a conversation with Beaton; that Beaton said that Cozzens had turned the matter over to him; that he, Rosenberg, told Beaton the price he could get the work done for; that the conversation was very general regarding the cost of printing; that he, Rosenberg, showed Beaton memoranda and estimates made by him, Rosenberg, as to what the job would come to at the prices that he, Rosenberg, could get the work done; that Beaton made some figures and said that it would be impossible to do the work at such prices; that it would make a difference of 25% and that no printer would figure that much lower; that he, Rosenberg, said that he could get the work done at prices 25% less than theirs; that he, Rosenberg, would have to take his work away from the plaintiff; that he had another conversation with Beaton in May, 1922; that this conversation was pretty much the same as the previous one; that he had another conversation with Beaton in the latter part of May, in which they went over the figures again.

It will be observed that there is no direct evidence that the withdrawal of the work was made under paragraph 8 of the contract. Neither of the notices of withdrawal of the work states that the withdrawal was made under paragraph 8 of the contract; and furthermore, in none of the conversations between Rosenberg and Cozzens and Beaton was paragraph 8 specifically mentioned or referred to.

From Beaton's testimony, together with the fact that

It is noted that the above information was obtained from a confidential source who has provided reliable information in the past.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The majority of the population of the United States is now living in urban areas, and this is a result of the process of urbanization, which has been going on since the beginning of the 20th century.

Journal of Management Education 33(10)

and any gathering of more than 100 persons shall be subject to the same

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and that the FBI is conducting a wide range of investigations.

5. The following information is provided for the year ended 31 December 2014:

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and this increase has been largely due to the growth of the urban population. The urban population has increased from about 40 million in 1900 to over 100 million in 1950, and this increase has been largely due to the growth of the urban population. The urban population has increased from about 40 million in 1900 to over 100 million in 1950, and this increase has been largely due to the growth of the urban population.

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CONFIDENTIAL

Fig. 2. Schematic diagram of the experimental setup for the study of the effect of the initial concentration of the polymer solution on the rate of polymerization.

What are the consequences of having a low level of education? (1990, p. 10)

[illegible]

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Rosenberg gave written notice of the withdrawal of the work, reasonably it could be inferred that Rosenberg withdrew the work under paragraph 8. But there are undisputed facts which cannot be reconciled with such an inference. In all of the conversations between Rosenberg and Beaton and Cozzens the question of the prices of the work was discussed, although by the terms of paragraph 8 Rosenberg could withdraw the work regardless of the cost of the work. In such circumstances it is difficult to understand why there should have been any discussion of the cost of the work, if Rosenberg was contemplating a withdrawal of the work under paragraph 8. The question of the cost of the work was an essential condition for the withdrawal of the work under paragraph 7; and as Rosenberg discussed the cost of the work with Cozzens and Beaton, it might be a fair inference that the withdrawal was made under paragraph 7. In other words, if Rosenberg intended to withdraw the work under paragraph 8, all of the discussions between him and Beaton and Cozzens in regard to the cost of the work apparently were meaningless. If, however, Rosenberg intended to withdraw the work under paragraph 7, the purpose of the discussions of the cost of the work could be explained. Furthermore, when Beaton told Rosenberg that although he, Beaton, was not familiar with the contract, he understood that the contract required Rosenberg to give the plaintiff thirty days notice of the withdrawal of the work, since Beaton did not say specifically that paragraph 8 required that a notice of 30 days should be given, and since he did not profess to be familiar with the terms of the contract, the inference might not be improbable that Beaton was under the impression that the contract provided generally that Rosenberg could not withdraw the work in any event unless he gave the plaintiff thirty days notice.

We are of the opinion that the evidence relating to the question whether Rosenberg withdrew the work under paragraph 8 of the contract leaves the question in doubt. But it is the rule that a verdict will not be disturbed merely because the evidence is doubtful. Illinois Central Railroad Company v. Cowles, 32 Ill., 116, 121; DeForrest v. Oder, 42 Ill., 500, 501. We think that there is sufficient evidence to sustain the verdict. It is a familiar rule "that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." Carney v. Shady, 295 Ill., 73, 83.

Counsel for the plaintiff further contend that even if the defendant relies on its right to withdraw the work under paragraph 7 of the contract, the defendant has not shown by a preponderance of the evidence that at the time the defendant withdrew the work the prices charged by the plaintiff were 20 per cent higher than the prices charged by three other responsible printing concerns in Chicago for doing similar work.

On the issues of fact involved in this question the evidence is conflicting. In this state of the record we do not deem it necessary to enter into a discussion of the evidence. It was the special province of the jury to determine the truth of the case, (People v. Rousher, 303 Ill., 375, 380); and we do not think that the verdict of the jury is manifestly against the weight of the evidence.

It is further contended by counsel for the plaintiff that the trial court committed reversible error in allowing Clara R. Lacey, one of the principal witnesses for the defendant, to testify that the prices charged by the plaintiff were more than 20 per cent in excess of the prices charged by other printers; that

TO THE HONORABLE SENATE OF THE UNITED STATES
IN SENATE, FEBRUARY 11, 1903.
REPORT
OF THE
COMMISSIONERS OF THE GENERAL LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 11, 1902.
WASHINGTON: GOVERNMENT PRINTING OFFICE: 1903.

There is no doubt that the Government is in a position to do so, and it is a matter of course that the Government should do so. The Government is in a position to do so, and it is a matter of course that the Government should do so.

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, at Washington, D.C., regarding the land owned by the United States in the State of California.

The total area of land owned by the United States in the State of California is approximately 60,000,000 acres. This land is divided into several categories, including National Forests, National Monuments, and other public lands.

The following table shows the distribution of land ownership in California:

Category	Area (Acres)
National Forests	28,000,000
National Monuments	12,000,000
Other Public Lands	20,000,000
Total	60,000,000

This information was obtained from the records of the Department of the Interior, Bureau of Land Management, at Washington, D.C.

It is further suggested that the following be added to the list of items to be included in the report of the Committee on the Administration of the Government of the District of Columbia:

this was an expression of opinion by the witness on an ultimate fact for the jury. We do not think that the ruling of the court constituted prejudicial error. The testimony was not an opinion of the witness; it was a computation. The testimony was given in connection with a comparison of the prices charged by the plaintiff with the prices charged by three other responsible printing concerns in the city of Chicago. The computations on such a comparison were difficult and intricate. The rule is that where calculations are complicated, the result may be given by an expert. Estate of Smythe v. Evans, 209 Ill., 376, 388; Guarantee Company v. Mutual Building & Loan Ass'n, 57 Ill. App. 254, 263. We think that the evidence shows that the witness was qualified to make the computations in question. Furthermore, the witness was thoroughly cross-examined by counsel for the plaintiff as to the facts on which she based her estimate; and the data which she used in making her comparison of the prices was admitted in evidence.

Counsel for the plaintiff assign errors on other rulings of the court relating to the evidence. We do not think, however, that any of the rulings complained of amount to reversible error.

It is further contended by counsel for the plaintiff that the court erred in modifying an instruction asked by the plaintiff. The instruction is not set out in the brief. This is not the proper way to present instructions for consideration by a court of review. General Platers Supply Co. v. Chas. P. L'Honnedieu & Sons, 228 Ill. App. 301, 306. The instruction, as requested by plaintiff, was as follows:

"Under the contract in evidence the defendant had the option to withdraw the said work, or any part thereof, from the plaintiff upon giving thirty days' notice of such election to the plaintiff and by paying to the plaintiff a sum of money to be ascertained on the basis of \$1,000.00 a year for each publication for the unexpired or remaining portion of the period of eight years from June 1, 1920, and if you find from the preponderance of the evidence that the defendant exercised said option and withdrew said work from plaintiff under the terms of said option, then the defendant became liable to pay to plaintiff the said sum of money."

As given by the court the instruction was as follows:

"Under the contract in evidence the defendant had the option to withdraw the said work mentioned in the contract or any part thereof, from the plaintiff upon giving thirty days notice of such election to the plaintiff and paying to the plaintiff a sum of money to be ascertained on the basis of \$1,000.00 a year for each publication for the unexpired or remaining portion of the period of eight years from June 1st, 1920; and if you find from the preponderance of the evidence that the defendant exercised said option and withdrew the said work from plaintiff under the terms of said option, then the defendant became liable to pay to plaintiff the said sum of money, but on the other hand, if you find from a preponderance of the evidence that at the time the work of typesetting, printing, binding and mailing 'Building Supply News' was withdrawn from Kenfield-Leach Company, and at the time of the work of typesetting, printing, binding and mailing Brick and Clay Record was withdrawn by Kenfield-Leach Company, the price charged by Kenfield-Leach Company for said work was twenty per cent or more in excess of the price charged by three or more responsible printing concerns in the city of Chicago doing similar work and that the defendant before it withdrew said work from plaintiff ascertained such fact, viz., that the plaintiff was charging the defendant twenty per cent or more in excess of the price charged by three or more responsible printing concerns in the city of Chicago doing similar work, and for such reason the defendant withdrew the work from plaintiff, then the plaintiff cannot recover."

We do not think that the court committed error in giving the instruction as modified.

In the view we have taken of the evidence there was sufficient evidence to justify the court in submitting both questions to the jury, namely, whether the withdrawal of the work was made under paragraph 8 or paragraph 7 of the contract; and also in submitting the question to the jury whether the plaintiff was charging the defendant 20 per cent or more in excess of the price charged by three or more responsible printing concerns in the city of Chicago doing similar work.

Counsel for the plaintiff contend further that the court erred in refusing to give "instructions Nos. 5 and 6," which were requested by the plaintiff. The instructions are not set out in the brief, but are referred to by the abstract page. However, we have examined the instructions, and we do not think that the action of the court in refusing them would justify us in reversing the judgment.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Metchett, J., concur.

125 - 29535

JACOB FRANK,
Appellant,

vs.

THOMAS T. HOSKINS COMPANY,
Appellee.

4570a
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

238 I.A. 621

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Jacob Frank, from a judgment in the sum of \$614.75 in favor of the plaintiff in an action brought by the plaintiff on two promissory notes totalling \$2400, executed by the defendant and payable to the plaintiff. The case was tried before the court without a jury.

One note dated November 10, 1920, and due 30 days after date, was for \$1000; the other note, dated September 5, 1922, due 90 days after date, was for \$1400. The evidence shows that \$900 was paid by the defendant on the \$1400, leaving a balance due of \$500. The defendant does not deny that the balance is due to the plaintiff on the \$1400 note, but the defendant alleges that the \$1000 note has been paid.

According to the well established rule payment is an affirmative defense, and the burden of proving payment is on the defendant. Ross v. Skinner, 107 Ill. App. 579, 581; 30 Cyc. pp. 1253, 1254.

The only question to be determined is whether the defendant has shown by a preponderance of the evidence that the note for \$1000 was paid.

The plaintiff was engaged in the saloon business and his place of business was located at the northeast corner of Clark and Illinois streets, in the City of Chicago. The defendant company was engaged in the automobile repair business, and

its place of business was located on Illinois street, a few doors east of Clark street. During several years the plaintiff had lent the defendant money and had cashed the pay checks of the employees of the defendant. On many occasions the checks of the defendant would return marked not sufficient funds, and the plaintiff would go to the defendant and receive an amount sufficient to cover the checks. At times the plaintiff exchanged checks with the defendant as an accommodation to the defendant. Thomas T. Hoskins, president of the defendant company, testified on behalf of the defendant, that the plaintiff had helped him a good many times; that the plaintiff used to cash payroll checks frequently, and when they were returned marked not sufficient funds, the plaintiff would carry them sometimes two or three days. The account with the plaintiff was kept on the books of the defendant under the name of "accommodation account."

To support the plea of payment of the note for \$1000, the defendant offered ten checks amounting to \$1084.33, which the defendant claimed were given to the plaintiff in payment of the note. The \$84.33, according to the testimony of Hoskins, covered the interest on the note. On none of the checks was there any notation or memorandum showing that the checks were to be applied on the payment of the note; and there was no endorsement on the note of any payments whatever. The note was never delivered to the defendant, and Hoskins testified that he never asked the plaintiff to deliver the note to the defendant. The note was in the possession of the plaintiff at the time of the trial, and was introduced in evidence by the plaintiff. Oswald S. Winzer, a public accountant, who testified on behalf of the defendant, stated that the note did not appear on the books of the defendant. Albert F. Bauer, who was formerly an employee of the defendant, testified on behalf of the plaintiff that the note was entered on the books of the defendant in the accommodation

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account.

Bauer also testified that he talked to the plaintiff about the note and that he told the plaintiff "things will soon be in shape to take care of that." Bauer further testified that on one occasion he asked Hoskins if he still owed the plaintiff the note for \$1000; and that Hoskins said, "Well, I know we will take care of it some day."

The books of the defendant were not produced on the trial. Hoskins testified that they were burned in a fire that occurred in the basement of the premises occupied by the defendant.

The plaintiff testified that the checks, which the defendant claims were given to the plaintiff in payment of the note, were in fact given to the plaintiff to cover checks of the defendant which had been cashed by the plaintiff, and which had been returned by the bank marked not sufficient funds. The plaintiff further testified that in November or December, 1922, he called up Hoskins and asked him to settle with him on the last loan, namely the note for \$1400; that he, the plaintiff, sent Hoskins a statement of his, the plaintiff's, account with the defendant, and that there appeared on that statement the following notation, "balance on the last note, \$500, radio 75."

Hoskins' wife and an employee of the defendant testified on behalf of the defendant that they saw the statement and that the notation was "balance of loan \$500; one radio set \$75." The defendant failed to produce the statement. Hoskins said a search for it had been made, but that it could not be found.

F. H. Reiter testified that he became connected with the defendant company in July, 1923, through a loan of \$10,000.00 he made that company; that prior to that time, namely, in January, 1923, he had the books of the company audited by a certified public accountant; that he went to see the plaintiff, showed the

plaintiff a balance of \$1400 due to the plaintiff, asked the plaintiff if that was all that was due him, and that the plaintiff said "yes". On cross-examination Reiter stated that he went to see the plaintiff in November, 1922, and had a conversation with him similar to the one testified to on direct examination. The plaintiff testified that he never had any such conversations with Reiter; that he met Reiter for the first time about a month before the trial.

When the note for \$1400 was given to the plaintiff, the plaintiff asked for security, and the defendant gave the plaintiff some stock as collateral security. The plaintiff testified that when this loan for \$1400 was negotiated, Hoskins said to the plaintiff "that makes \$2400 I owe you." Hoskins denied that he made any such statement.

We are of the opinion that the defendant has not proved by a preponderance of the evidence that the note for \$1000 was paid. We have reached this conclusion from a consideration of the undisputed facts without attempting to reconcile the conflicting parts of the testimony.

The manner in which the payment of the note is alleged to have been made is opposed to customary conduct in such transactions. There was no notation on the checks which the defendant claims were given in payment of the note, to connect them with such payment. No endorsement of any payments were made on the note; and the note was never marked paid. Furthermore, the note was never delivered to the defendant, but remained in the possession of the plaintiff. Another fact which raises a serious doubt as to the payment of the note is that when the loan of \$1400 was made by the plaintiff to the defendant, the plaintiff required the defendant to give him collateral security. The plaintiff had never asked for security in any of the other loans that he had made to the defendant, and the fact that he

demanding security when the \$1400 loan was made would tend to support the inference that the \$1000 note was unpaid.

The testimony of Reiter in regard to the alleged conversations he had with the plaintiff in regard to the note of \$1400 is wholly improbable. If, as Reiter states, the books of the defendant showed that the note of \$1400 was the only indebtedness to the plaintiff, why should Reiter question the plaintiff about the correctness of the item? And why should Reiter inquire of the plaintiff specifically if that "was all" that was due to the plaintiff? The plaintiff denies that he ever had any such conversations with Reiter; that he did not know Reiter until about a month before the trial. But aside from the plaintiff's denial, the testimony of Reiter is inherently improbable.

Counsel for the plaintiff contends that the plaintiff is entitled to recover reasonable attorney's fees. The only testimony in regard to attorney's fees was given by Harry J. Guyon on behalf of the defendant. He testified that ten per cent of the amount of a note would be a reasonable, customary fee. The two notes provided for attorney's fees of ten per cent. On this basis the attorney's fee for the \$1000 note would be \$100; and for the \$500 balance on the \$1400 note would be \$50. The note for \$1000 provided for interest at the rate of 7 per cent and the note for \$1400 for 6 per cent. At this rate of interest the amount of interest due on the \$1000 note from the date of the note, namely, November 10, 1920, to the date of the judgment entered here, namely, June 22, 1923, would be \$323.26; and the amount due on the \$500 balance on the \$1400 note from January 6, 1923, the date of the last payment of the note, to the date of the judgment entered here would be \$73.92.

For the reasons stated in the opinion the judgment of the trial court is reversed, and judgment in favor of the plaintiff will be entered here in the sum of \$2847.18.

REVERSED AND JUDGMENT HERE.

McSurely, F. J., and Hatchett, J., concur.

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142 - 29558

HENRY J. MUELLER,
Appellee,

vs.

GEORGE M. HAYES,
Appellant.

4571a
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

238 I.A. 621²

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by George M. Hayes, the defendant, from a judgment on a verdict in the sum of \$5,000 in an action brought by Henry J. Mueller, the plaintiff, for damages for personal injuries received in a collision between a motorcycle ridden by the plaintiff and an automobile driven by Floyd Hayes, the son of the defendant.

The principal grounds on which the defendant asks for a reversal of the judgment relate to questions of pleading and proof.

The declaration alleged that Floyd Hayes was in business with the defendant as a copartner; that the automobile "was being driven and under the care, control and direction of" Floyd Hayes "as a member of and agent for said firm and copartnership;" and that "the said Floyd Hayes, as a member of, and as agent for said firm and copartnership, so carelessly and negligently operated, drove and managed" the automobile that it struck the motorcycle and as a consequence the plaintiff was injured. The defendant filed a plea of the general issue.

On the trial the plaintiff introduced no evidence to prove that Floyd Hayes was a partner in the business with the defendant, or that Floyd Hayes was the agent of the firm.

The defendant offered evidence tending to prove that Floyd Hayes was not a copartner with the defendant, and that Floyd Hayes was not an agent of the defendant.

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4-10-1941
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WILLIAM J. BROWN
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RE. JAMES J. BROWN, JR. (DECEASED) AND OTHERS

This is to certify that the following is a true and correct copy of the original as filed in the office of the Clerk of the Court, to-wit:

From a report on a hearing at the Court on the 10th day of January, 1941, the following was reported by James J. Brown, Jr., deceased, the father of the deceased, James J. Brown, Jr., deceased, who was reported to be in custody of the Court, and who was reported to be in custody of the Court.

The original report on the hearing was filed in the office of the Clerk of the Court, to-wit:

On the 10th day of January, 1941, the following was reported by James J. Brown, Jr., deceased, the father of the deceased, James J. Brown, Jr., deceased, who was reported to be in custody of the Court, and who was reported to be in custody of the Court.

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From a report on a hearing at the Court on the 10th day of January, 1941, the following was reported by James J. Brown, Jr., deceased, the father of the deceased, James J. Brown, Jr., deceased, who was reported to be in custody of the Court, and who was reported to be in custody of the Court.

The trial court refused to allow the defendant to introduce such evidence on the ground that the evidence was immaterial under the pleadings.

Counsel for the defendant contend that the ruling of the court constituted reversible error; that proof of the allegations in question in the declaration of the plaintiff was essential in order that the plaintiff should establish a cause of action; and that the defendant's plea of the general issue required the plaintiff to make such proof.

It is the contention of counsel for the plaintiff that the proof was not necessary; that the plea of the general issue of the defendant admitted that Floyd Hayes was a copartner of the defendant; and admitted that Floyd Hayes was the agent of the defendant and that the automobile was under the control and operation of the defendant.

We are of the opinion that the ruling of the trial court was correct.

The rule has been repeatedly announced in a long line of decisions that the question of the ownership and operation of the instrumentality that causes an injury is not put in issue by the plea of the general issue. McSulta v. Lockridge, 137 Ill. 370, 384, 385, 386; Pennsylvania Co. v. Chapman, 230 Ill. 428, 431; Chicago Union Traction Co. v. Jerka, 227 Ill. 98, 99; Pell v. The Joliet, Plainfield & Aurora Railroad Company, 238 Ill. 510, 514; Branhild v. Union Traction Co., 239 Ill. 621, 624; Carlson v. Johnson, 263 Ill. 556, 560, 561, 562; Wheeler v. The Chicago & Western Indiana Railroad Company, 267 Ill. 306, 327; Beringhoff v. Futterer, 176 Ill. App. 579, 586, 587; Kieszkowski v. Bostrom, 179 Ill. App. 73, 77, 78; Smith v. Tappen, 304 Ill. App. 433, 435.

The first part of the report is devoted to a general survey of the situation in the country. It is then followed by a detailed account of the work done during the year. The report concludes with a summary of the results and a statement of the future prospects.

It has also been explicitly held that the plea of the general issue admits the capacity in which the defendant is sued. McSulta v. Lockbridge, *supra*; Illinois Life Ass'n v. Fells, 200 Ill., 445, 453.

Counsel for the defendant contend that according to the general rules of common law pleading the plea of the general issue does not admit allegations in the declaration which are essential to be proved by the plaintiff in order that he may establish a cause of action, and that the allegations in question in the declaration that Floyd Hayes was the partner and agent of the defendant are not mere allegations by way of inducement but must be considered "the charging part" of the declaration and consequently should be proved by the plaintiff. This position of counsel for the defendant cannot be maintained in view of the fact that it has been expressly held that such allegations are matters of inducement; Chicago Union Traction Co. v. Jeras, *supra*, p. 99; Carlson v. Johnson, 263 Ill., 455, 461.

It may be said that the argument of counsel for the defendant in regard to the general principles of common law pleading is answered in the case of Chicago Union Traction Co. v. Jeras, *supra*. In this respect the court said (p. 100):

above

"Whether the rule laid down is in strict accord with the principles of common law pleading as they existed prior to the adoption of the rule of the court of the Hilary term, 1834, is a matter of little practical concern, since the rule of *stare decisis* requires us to enforce the law as we find it, unless considerations of a very controlling character were presented which would justify us in overruling the previous decisions of this court and again laying the foundations of law anew. We see no hardship in requiring a defendant in a case of this character to plead specially that it was not the owner or in possession or operation of the property or instrumentalities which have caused the injury. The enforcement of this rule will, in our opinion, promote the ends of justice."

Counsel for the defendant further earnestly insist that the case of Clark v. Wisconsin Central Ry. Co., 261 Ill. 437, is controlling authority for the contention that the plea of the

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general issue in the case at bar required the plaintiff to prove the allegations in question. We do not agree with the contention of counsel. In the case of Clark v. Wisconsin Central Ry. Co., *supra* the instrumentality with which the agent of the defendant caused the injury was a railroad velocipede. The court held that the plea of the general issue put in issue the ownership of the railroad and of the instrumentality that caused the injury, for the reason that the instrumentality was not one ordinarily or commonly used in the railroad business. In the case at bar the declaration alleged that Floyd Hayes and the defendant were engaged as partners in the coal business. We do not think that reasonably it can be said that an automobile was not an instrumentality ordinarily or commonly used in connection with such business.

After the trial of the case had begun the defendant made a motion for leave to file special pleas instantter denying that Floyd Hayes was a copartner in business with the defendant, and also denying that Floyd Hayes was the agent of the defendant. The court refused to allow the motion.

Counsel for the defendant contend that the ruling of the court constituted reversible error.

The accident occurred on February 24, 1921, and the declaration of the plaintiff was filed on March 21, 1922. The defendant's plea of the general issue was filed on April 14, 1922, and the trial was begun on March 18, 1924. The motion of the defendant for leave to file the special pleas instantter was made on March 19, 1924. It will be observed that the Statute of Limitations had run when the defendant made the motion to file the special pleas. In the circumstances we are of the opinion that the action of the trial court was not an abuse of discretion.

Beringhoff v. Futterer, *supra*, (p. 587); Kuschkowski v. Bostrom, 179 Ill. App. 73.

General leave in 1911 was in fact required for the purpose of the
the obligation is essential. It is not given with the possibility
of service. In the year of 1911, the obligation was not given
the responsibility with which the duty of the Government towards the
injury was a religious obligation. The court held that the duty
of the general leave was in fact the obligation of the religious
and of the responsibility that caused the injury, for the
reason that the responsibility was not one exclusively or commonly
vested in the religious obligation. It was not as for the obligation
assigned that they were not the religious duty of the Government
in the same manner, as it was for the Government to be
held that an obligation was not an exclusively religious duty
exclusively held in connection with such persons.
After the trial of the case had begun the defendant
made a motion for leave to file a second brief in support of his
first brief. There was a suggestion in support of this motion.
and also stating that they were the duty of the Government.
The court refused to allow the motion.
The court for the defendant contended that the trial of
the case constituted a religious duty.
The defendant appeared on February 24, 1911, and the
testimony of the plaintiff was taken on March 11, 1911. The
defendant's case at the trial was taken on March 11, 1911,
and the trial was begun on March 11, 1911. The motion of the
defendant for leave to file the second brief in support of his
first brief, it will be observed that the motion of the
court had the same effect as the motion of the
court. In the defendant's case as for the plaintiff's
the motion of the trial court was not an order of admission.

Counsel for the defendant assign error on the action of the court in giving and refusing certain instructions. The instructions are not set out in the brief of counsel for the defendant. This method of presenting instructions for consideration by a court of review has been held to be improper. General Platers Supply Co. v. Charles F. L'Honnedieu & Sons, 228 Ill. App. 201, 206. We have examined the instructions, however, and we do not think that any error properly may be assigned on the action of the court in regard to the instructions.

Counsel for the defendant contend further that the plaintiff was guilty of contributory negligence which was the proximate cause of the accident.

The general rule in regard to the question of contributory negligence is stated in the case of Kelly v. Chicago City Ry. Co., 283 Ill. 645, as follows:

"As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Ry. Co., 259 Ill. 476) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

In the case at bar the question whether the plaintiff was guilty of contributory negligence was a question of fact for the jury.

The accident occurred at the intersection of Lawrence avenue and Linder avenue, thoroughfares in the City of Chicago. Lawrence avenue is an easterly and westerly street and Linder avenue is a northerly and southerly street. The plaintiff was riding on Lawrence avenue and Floyd Hayes was driving the automobile on Linder avenue. There is evidence that the automobile

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 against the accused.

The present rule in regard to the passing of non-
 ordinary negligence is stated in the case of Wells v. Wells,
101 N. H. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909

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was going at the rate of forty miles an hour. There is also evidence tending to show that the automobile was at such a distance from Lawrence avenue that the plaintiff reasonably might have believed that he could cross Linder avenue in safety ahead of the automobile.

We are of the opinion that the verdict of the jury was not manifestly against the weight of the evidence.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

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151 - 29567

AARON COHN,

Appellant,

vs.

EUGENE A. HUGHES, Administrator
de bonis non with the Will annexed
of the Estate of SARAH ELIZABETH
TURNER, Deceased,
Appellee.

4572a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 621³

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Aaron Cohn, the plaintiff, from a judgment on a finding by the court in favor of the defendant, in an action brought by the plaintiff against the defendant to recover commissions alleged to be due to the plaintiff for procuring a purchaser ready, able and willing to buy property owned by the defendant.

After the appeal bond was filed Sarah Elizabeth Turner, the original defendant, died, and the cause was continued in the name of the administrator.

The principal ground on which the plaintiff asks for a reversal of the judgment is that the finding of the trial court is manifestly against the weight of the evidence.

By stipulation of the parties all of the evidence was taken by depositions on oral interrogatories and the depositions were read at the trial.

Mrs. Turner was the owner of an apartment building in the city of Chicago. The plaintiff claimed that Mrs. Turner requested him to procure a purchaser for the building; that he procured as a purchaser his mother, Mrs. Rachel Cohn, who offered to buy the building for \$75,000; that her offer was approved and accepted by Mrs. Turner, but that Mrs. Turner refused to complete the sale.

4330 - 111

• **RESEARCH** •

237

1. The first step is to identify the problem.
 2. The second step is to analyze the problem.
 3. The third step is to develop a solution.
 4. The fourth step is to implement the solution.
 5. The fifth step is to evaluate the solution.

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2. 3000 copies of the report will be made available to the public at a cost of \$1.00 per copy. The report will be made available to the public at a cost of \$1.00 per copy. The report will be made available to the public at a cost of \$1.00 per copy.

It is suggested that the results of the following study be used by the following:

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Mrs. Turner denied liability on the grounds that although she had negotiations with the plaintiff in regard to the sale of the property, she did not approve or accept the offer of the plaintiff's mother, or agree to sell the building on any terms or conditions; that if the plaintiff procured any offer from his mother to purchase the building, the plaintiff was acting in the interest of his mother and not of Mrs. Turner; and that the plaintiff did not disclose to Mrs. Turner the fact that the prospective purchaser was his mother.

The plaintiff testified that he called at Mrs. Turner's residence and talked to her in regard to the sale of the property; that on nearly every visit the interviews lasted about two or three hours; that in the first interview he asked her if she would give him a price and that she said she ought to get \$85,000; that she said the rentals were around \$21,000 a year; that he told her that he thought the price was not unreasonable, but that selling real estate with any particular broker was simply a matter of what propositions the broker could get on a particular piece of property, and that making a sale was then getting the parties together on the asking price and the selling price; that he told her any seller ought to get all he could on a sale, and every buyer ought to buy as cheap as he could; that after this interview with Mrs. Turner he called on her again; that she stated she would like to get \$85,000 for the property; that he told her he would see if he could procure an offer for \$85,000 and that after some further conversation in regard to the price she said she would consider \$80,000; that he told her that he had a party, that he would take over the property and whatever offer he procured he would submit to her, Mrs. Turner, for her consideration; that after this interview he took his mother and father to see the property; that he and his mother and father "talked it over" and he, the plaintiff, was "given an offer of \$70,000 for

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540 EAST 58TH STREET
CHICAGO, ILL. 60637

the property" by his mother; that thereafter he called on Mrs. Turner and told her that he had an offer of \$70,000; that Mrs. Turner said that she would not take \$70,000, and that after some discussion he made the suggestion that if she would make the price \$75,000 he would see if he could get the prospective purchaser to increase the offer to \$75,000; that Mrs. Turner said that she did not like to let the property go at that price, but that in view of the fact that it was the last piece of property she had left, with the exception of the house in which she lived, which she was also contemplating selling if she could get a purchaser, and in view of the fact that she wanted to clean up so that she might go to California with her sister, if she got an offer of \$75,000 she would sell the property; that she asked what his commission on the sale would amount to; that he told her that his commission would be the regular three per cent fixed by the Chicago Real Estate Board and that the commission would amount to \$2,250, and that the net proceeds to her for the sale would be \$72,750, less the ordinary deductions for pro rating; that Mrs. Turner "demurred about selling the property for \$75,000," but that he told her that the sale price of \$80,000 or \$75,000 on an income basis was not commensurate with the income of the property if she put the money out at six per cent.; that the difference on the income of \$5,000 more or less in the sale price really represented on a six per cent. basis only \$300 a year in her income; that Mrs. Turner said that she wanted approximately one-half cash, and that they finally agreed on \$35,000 cash and \$40,000 on a mortgage on the property to run for five years; that following this interview he had a talk with his mother in which he told her that he had another talk with Mrs. Turner and that she had finally agreed to accept \$75,000 for the property; that if she, his mother, wished to purchase the property she would have to pay that amount for it; that

[illegible]

she said that he should go ahead and consummate the deal for her; that he went to see Mrs. Turner and told her that the price of \$75,000 had been accepted, of which \$35,000 or, if necessary, \$40,000, would be paid in cash; that Mrs. Turner told him she had spoken with a few friends in regard to the sale of the property and that they had advised her against it; that one of the friends was William Scott Bond, who was collecting the rent on the property; that she said that in spite of that it was her property, that she intended doing as she wished, and that she would sell for the price agreed on; that he asked her if she had an attorney who would draw up the contract for her; that she told him to go to Bond; that he agreed, asked her if he might call a taxicab and take her down to Bond's office, and that he would also get his client to go down there; that he asked her to give him an order on Bond to draw the contract; that she wrote the following note to Mr. Bond and gave it to him, the plaintiff:

"Dear Mr. Bond:

I have about decided to sell the 47th Building and this Mr. Cohn has offered me seventy-five thousand dollars for it forty thousand cash and a mortgage of thirty-five thousand. Will you see him and tell me what it will be necessary for me to do - I will come to you when you want me to. I could not get you by phone.

Yours very sincerely,
Sarah Elizabeth Turner."

that he, the plaintiff, went to Bond's office with the letter; that Bond telephoned to Mrs. Turner and informed him, the plaintiff, that Mrs. Turner said she did not want to go ahead with the contract. On cross-examination the plaintiff testified that he did not try to persuade Mrs. Turner to sell; that he did not think it called for any persuasion; that he did tell her the neighborhood was all colored and the probabilities were that sooner or later colored people would get into the building and that he thought this would depreciate the value of the building; that he also told her that the building was an old four story building, which was not as desirable as a three story building. The plaintiff further testified on cross-

1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 26

1. The first of these is the fact that the
2. second is the fact that the
3. third is the fact that the
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6. sixth is the fact that the
7. seventh is the fact that the
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9. ninth is the fact that the
10. tenth is the fact that the

examination that when Mrs. Turner gave him the note to Bond, he, the plaintiff, read it and said to her, "I note here that you say 'I have about decided to sell,' and you should have said, 'I have sold or have agreed to sell';" that she said, "That is just my way of putting it in haste."

Mrs. Rachel Cohn, the mother of the plaintiff, testified on behalf of the plaintiff, that the plaintiff asked "us" if "we" would buy a nice piece of property; that "we" thought of buying and that the plaintiff said he had "a nice piece of property in view that he thought would suit us, and that he would take us out to see it;" that "we went over and looked at it and that it looked good" to her; that the plaintiff told her that Mrs. Turner was asking \$85,000, but that he had talked with her and that she had decided to take \$80,000; that she, Mrs. Cohn, did not feel as if she wanted to pay \$80,000, and that she told the plaintiff he might offer Mrs. Turner \$70,000; that the plaintiff came again to see her, Mrs. Cohn, told her that he had seen Mrs. Turner, offered her \$70,000, and that she would not listen to that, but that she did come down to \$75,000; that she, Mrs. Cohn, consulted her husband about it and he said if it was worth \$70,000 it ought to be worth \$75,000, and to make an offer of \$75,000; that she told her son that she would buy the property for \$75,000 and that he could make arrangements for payment in any way; that if Mrs. Turner wanted all cash, she, Mrs. Cohn, could raise the \$75,000; that she, Mrs. Cohn, was in a position to pay all or part of the \$75,000.

On cross-examination Mrs. Cohn testified that the plaintiff did not urge her to pay \$85,000 or to pay \$80,000.

Andrew B. Caswell, a banker, gave testimony on behalf of the plaintiff which showed that Mrs. Cohn was financially able to buy the property.

Mrs. Turner, who was 78 years of age, testified that

she had never offered her property for sale to anybody; that she did not state to the plaintiff that her property was for sale; that the first time that she met the plaintiff was when he called at her home and spoke to her about the property; that his visit lasted for two or three hours; that her recollection of the conversation was not clear; that he said the property would not be worth very much because the neighborhood was changing; that colored people would get in there and all sorts of things; that the building was old and not worth as much as it had been; that she told him a dozen times that she did not know whether she wanted to sell or not; that she had more than one lengthy interview with the plaintiff at her home; that at none of the interviews did she tell the plaintiff that if she got an offer of \$75,000 she would sell; that the plaintiff kept saying, "Why don't you say you will sell it," and different things of that kind; that she said, "I don't know whether I want to sell or not;" that she repeatedly said ^{that} to him; that when she wrote the letter to Bond she had about made up her mind to let him sell the property; that the plaintiff said, "Why do you say 'about?'" that she said, "Because I have not. Now that is exactly it. I don't know whether I want to sell it or not;" that after this interview the plaintiff came back that night; that the plaintiff said he was surprised to think that she had changed her mind; that she said, "Well, I hadn't made up my mind;" that she doesn't know what she said; that she told him she didn't want to talk to him; that he said, "What about the poor broker?" that she answered, "The broker, what do you mean?" that he said, "What about my commission?" that she replied, "You have no right to any commission, you haven't sold anything for me;" that he said, "I will sue you;" that she replied, "Go ahead and sue." Mrs. Turner testified on cross-examination that after the plaintiff left with the note to Bond she told Bond that she didn't want to sell; that the plaintiff had been urging her to sell, and that she had

The first thing that struck me when I stepped out of the car was the heat. It was a sticky, oppressive heat that seemed to wrap around me like a heavy blanket. I had heard that the weather in New Orleans was terrible, but I didn't realize it would be this bad. The sun was beating down on me, and the air was thick with humidity. I had never experienced anything like this before.

As I walked towards the hotel, I noticed that the streets were empty. There were no cars, no people, just a vast expanse of hot, empty pavement. I felt a little uneasy, but I pushed forward. The hotel was just around the corner, and I could see the sign above the entrance. I walked up the steps and entered the lobby. The lobby was large and ornate, with high ceilings and chandeliers. There were several people sitting at tables, and a waiter was standing nearby. I approached the desk and asked for a room.

The clerk at the desk looked at me and then at the sign on the wall. He seemed confused. I showed him the sign, and he finally understood. He led me to a room on the second floor. The room was small and simple, with a bed, a desk, and a chair. I took a shower and then went back to the desk. I asked the clerk if there was anything I should know about the hotel. He told me that the hotel was very old and that the rooms were small, but that the service was excellent. He also told me that the hotel was very quiet and that the air conditioning was very good. I thanked him and went back to my room.

I lay in bed and thought about the heat. It was so hot that I couldn't sleep. I had heard that the weather in New Orleans was terrible, but I didn't realize it would be this bad. I had never experienced anything like this before. I decided to go back to the desk and ask the clerk for some advice. I went down to the lobby and found the clerk. I told him that I was having trouble sleeping because of the heat. He told me that he had a solution. He said that he had a small fan that he could use in my room. I thanked him and went back to my room. I turned on the fan and went back to bed.

The fan was a small, old-fashioned fan, but it worked. It was just what I needed to get some sleep. I fell asleep and woke up in the morning. I felt much better. I had a good night's sleep. I went down to the desk and asked the clerk for some breakfast. He brought me a plate of food and a glass of juice. I ate and drank and felt great. I was in good luck. The hotel was just what I needed. It was quiet, it was clean, and the service was excellent. I was going to have a great stay.

I went back to my room and packed my things. I was ready to leave. I went down to the desk and asked the clerk for some directions. He gave me a map and some advice. I thanked him and went outside. The sun was still beating down on me, but I didn't mind. I was going to have a great day. I walked towards the beach and saw a group of people. They were sitting on a bench and talking. I went over to them and joined them. We talked and laughed and had a great time. I was in good luck. I was going to have a great stay.

almost decided to let him have it; that the plaintiff wanted her to sign some paper and that she said, "I shan't sign any paper. You must see Mr. Bond."

Mrs. Susan A. Pierce, a sister of Mrs. Turner, testified on behalf of the defendant that she was present during all of the first interview between the plaintiff and Mrs. Turner; that the plaintiff said to Mrs. Turner, "You know it would be a great deal better for you, Mrs. Turner, to sell your property and put it in Liberty bonds. The 'niggers' will get in there and then your property will go down;" that Mrs. Turner said, "I don't know whether I want to sell it or not. I just lost my friend, I can't think;" that the plaintiff said, "Oh, Mrs. Turner, please, please Mrs. Turner, sell your property to me and put your money in Liberty bonds. You know it will be a great deal better, and I have got a client to buy it;" that the plaintiff never told the client's name nor never brought any client there; that Mrs. Turner said, "Why do you want it if it is going to have 'niggers' and is so old?" that he replied, "Well, my client wants it;" that at another interview between the plaintiff and Mrs. Turner the plaintiff kept assing and urging Mrs. Turner to sell the property; that Mrs. Turner said, "I can't even think because I am in such sorrow for my friend. I don't know whether I want to sell my building or not;" that then he would say, "Mrs. Turner, oh, Mrs. Turner, please, Mrs. Turner;" that she, the witness, does not think that at either of the interviews Mrs. Turner said if she got an offer of \$75,000 for the property she would sell; that she, the witness, heard a conversation between the plaintiff and Mrs. Turner about the wording of the note to Bond; that the plaintiff said, "Why do you say 'about'?" that she can remember that distinctly; that Mrs. Turner said, "Because I have not really made up my mind. I want to talk to Mr. Bond;" that she heard another conversation between the plaintiff and Mrs. Turner;

that Mrs. Turner told the plaintiff that she did not want him ever to come there again; that the plaintiff said, "What of the broker, what of the poor broker;" that Mrs. Turner said, "What do you mean?" that he answered, "Why, where are my commissions?" that Mrs. Turner replied, "Your commissions; I don't owe you any commissions. You have done nothing for me. I didn't hire you;" that he said, "Well, I will sue you;" that Mrs. Turner said, "Go ahead and sue."

William Scott Bond testified on behalf of the defendant that when he read the note from Mrs. Turner he said to the plaintiff that the note did not say that Mrs. Turner had decided to sell the property, but that she had about decided to sell; that he asked Mrs. Turner over the telephone whether she wanted to sell and that she said no, she did not; that he told the plaintiff that Mrs. Turner said that she did not want to sell the property; that the plaintiff said that she had agreed to sell the property. Bond testified on cross-examination that he did not understand the following part of the note: "Will you see him and tell me what it will be necessary for me to do? I will come to you when you want me to;" that this clause coupled with the first part of the note was the reason he wanted to talk to Mrs. Turner; that he was doubtful whether Mrs. Turner had told the plaintiff she would sell, or whether she was still only negotiating; that he could not interpret the end of the latter; that the letter does not hitch up; that he told Mrs. Turner in his opinion she should not sell the property; that he thought it was valuable property for her to keep.

We are of the opinion that the plaintiff has not shown by a preponderance of the evidence that Mrs. Turner finally and definitely agreed to sell her property. On the plaintiff's own testimony, fairly and reasonably interpreted, it is not satisfactorily or convincingly shown that Mrs. Turner consented to sell the property. She was in a state of indecision, rather inclined to

That was, I think, the first time
 I saw him. He was a very
 young man, about 20 years old,
 with dark hair and eyes, and
 a very pleasant smile. He
 was wearing a dark suit and
 a white shirt with a dark tie.
 He was standing in the middle
 of the room, looking at me
 with a friendly expression.

William Henry Wood testified on behalf of the defendant that when he read the note which was found in the defendant's pocket, he was not at all surprised or shocked by its contents. That the note did not say anything which he would not expect to find in a letter from a woman to a man, and that the note was not at all suggestive of any crime. He also testified that he had never seen the defendant before or since the time when he found the note, and that he had never seen the note before or since the time when he found it. He also testified that he had never seen the note before or since the time when he found it.

At the time of the execution of the contract, the Government was not aware of the fact that the contract was being executed by a person who was not a citizen of the United States.

sell, it is true, but unable to reach a positive conclusion. She did not request the plaintiff to sell the property. The plaintiff called at her home and solicited her to sell the property. There were several lengthy interviews between her and the plaintiff, and various arguments were urged by the plaintiff to induce her to sell the property. The plaintiff testified that he did not try to persuade her to sell the property; that he did not think that "it called for persuasion," yet the plaintiff admitted that he did tell her that the neighborhood around her property was colored and that the probabilities were that sooner or later colored people would get into her building. He also admitted that he told her that her building was an old four story building and was less desirable than a three story building. The fact that these arguments were used by the plaintiff justifies the inference that Mrs. Turner was reluctant to sell and that the situation did call for persuasion. Furthermore, the fact that the plaintiff himself was aware of Mrs. Turner's undecided state of mind is shown by his testimony, in which he stated that he questioned her concerning the use of the word "about" in the note to Bond. He recognized that the way the note was worded Mrs. Turner had not finally agreed to sell the property, and he told her that she should have said, "I have sold or have agreed to sell." Although he testified further that Mrs. Turner's explanation was that it was just her way of putting it in haste, yet he did not insist on her changing the language in the note. In this connection it must be borne in mind that the plaintiff testified that Mrs. Turner told him that she did not like to let the property go at \$75,000, the amount named in the note; that Mrs. Turner "demurred about selling the property for \$75,000."

As we have previously stated, we do not think that on the plaintiff's own testimony it can be said, reasonably and fairly,

that Mrs. Turner definitely agreed to sell the property. When all of the evidence is considered we are clearly of the opinion that Mrs. Turner never reached a final conclusion.

We are further of the opinion, as an independent ground of our decision, that the plaintiff is not entitled to recover any commissions for the reason that the evidence shows that while the plaintiff was attempting to act as the agent of Mrs. Turner he was the agent of his mother, and that he did not disclose to Mrs. Turner the fact that he was acting as agent for his mother.

The rule is a familiar one that a person cannot act as the agent of both the seller and the buyer without the authority, knowledge and consent of both. Hampton v. Lacken, 72 Ill. App. 442, 443, 444; 2 C. J. section 367, p. 712; and an agent who represents the adverse party without his principal's consent cannot recover compensation from either his principal or the adverse party. 2 C.J. section 367, pp. 712, 713; section 430, p. 763.

In the case at bar the evidence shows that the plaintiff was more interested in securing a good bargain for his mother than in making an advantageous sale for Mrs. Turner. Although the plaintiff admits that he told Mrs. Turner that \$85,000, the price which she thought she ought to get for the property, was not unreasonable, yet he made no effort to induce his mother to agree to pay that amount. He did not even urge his mother to pay \$80,000 for the property. On the contrary, he says that he talked to his father and mother and "was given an offer of \$70,000;" and that this offer he communicated to Mrs. Turner. When Mrs. Turner refused this offer he suggested to her that he would see if he could get his "prospective purchaser" to pay \$75,000. His testimony that he told his mother that he had had another talk with Mrs. Turner and that she had "finally" agreed to accept \$75,000 is significant. That he was endeavoring to secure the lowest price possible for his mother is also

It was found that the above information was not sufficient to determine the exact location of the vessel. The vessel was located on the 10th of May, 1964, at the same place as the vessel was located on the 10th of May, 1964.

[illegible]

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, a Justice of the Peace for and in and for said County, do hereby certify that the within and foregoing is a true and correct copy of the original of the same, as the same appears from the records of said County.

[illegible]

evidenced by his efforts to depreciate the value of the property by telling Mrs. Turner that the building was undesirable because it was an old four story building, and also by telling her that the value of the building would be decreased because of the colored neighborhood around the building. A further circumstance indicating that the plaintiff was not acting for the best interests of Mrs. Turner is that although his mother was willing to pay \$75,000 cash for the property he never communicated that fact to Mrs. Turner.

Without discussing the evidence further we think that it clearly appears from the evidence that the interests of Mrs. Turner and Mrs. Cohn were conflicting; that the plaintiff should not have acted as the agent for both without disclosing the fact; and that in acting in the dual capacity he seriously prejudiced the interests of Mrs. Turner.

The rule is well established that the relation of an agent to his principal is ordinarily that of a fiduciary, and as such it is his duty in all dealings concerning or affecting the subject matter of his agency to act with the utmost good faith and loyalty for the furtherance and advancement of the interests of his principal. 2 C. J., section 353, p. 692.

For the reasons stated in the opinion the judgment of the trial court is affirmed.

AFFIRMED.

McBurely, P. J., and Hatchett, J., concur.

• 1990-1991 •

219 - 29636

JOSEPH GREENWALD and ABRAHAM
E. COHEN, Doing Business as
GREENWALD & COHEN,
Appellees,

vs.

MORRIS WILENSKY and ANNIE WILENSKY,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 621⁴

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Morris Wilensky and his wife, Annie Wilensky, the defendants, from a judgment in the sum of \$1000 in favor of the plaintiffs, Joseph Greenwald and Abraham E. Cohen, in an action brought by the plaintiffs to recover commissions alleged to be due to the plaintiffs for procuring a purchaser ready, able and willing to buy property belonging to the defendants.

The claim of the plaintiffs is that they entered into an agreement with the defendants to procure a purchaser for property of the defendants, at the net price of \$30,000; that they, the plaintiffs, procured a purchaser by the name of Sam Rubenstein, who was ready, able and willing to buy the property for the sum of \$31,000; that the defendants refused to sell the property.

Counsel for the defendants contend that the plaintiffs have not proved by a preponderance of the evidence that the terms of the sale of the property were accepted by the alleged purchaser, Sam Rubenstein. We think that this contention is correct.

On behalf of the plaintiffs three witnesses testified, the plaintiffs themselves and Sam Rubenstein.

The testimony of these three witnesses is indefinite and unsatisfactory. We shall state their testimony in their own language as nearly as possible.

Joseph Greenwald testified that "a party" told him that Wilensky wanted to sell "the building;" that he, Greenwald, rang the

bell;" that when he rang the bell he saw Mrs. Wilensky; that he said to her, "Are you Mrs. Wilensky, the landlady?" that she said "yes;" that he said, "Do you want to sell the building?" that she said, "Yes. Are you real estate broker?" that he said "Yes;" that she said, "Who is the other fellow?" that he said, "My partner;" that she said, "Come in the house;" that he went in the house; that he said, "What is the rental?" that she said, "About \$535;" that he said, "What are you getting for the flats about?" that she said, "About \$75 or \$80 for six;" that he "pinned her down;" that he said, "What is the price?" that she said, "Mr. if you get a buyer, I am awful sick; I want to go to California, you can do quick business with us;" that he said, "Where is your husband?" that she said, "Whatever I do, it is done, but if you want to see my husband come down tonight;" that he asked her the price and she said \$30,000; that he told her three per cent. commissions; that she said, "Yes, it is understood you are working for commissions;" that he said, "All right;" that he said, "What is the mortgage?" that she said, "\$12,000;" that he said, "How long to run?" that she said, "About fourteen months;" that he asked her how much cash was to be paid; that she said, "About \$10,000;" that she said the balance on a second mortgage was "About \$200 a month;" that he said, "I believe in about an hour I will be around with a customer;" that she said, "Any time;" that he "Went over to Rubenstein;" that he, Greenwald, knew Rubenstein was in the market to buy; that he, Greenwald, said, "I have got a nice little deal for you;" that he, Rubenstein, said "Where?" that he, Greenwald, said, "The southeast corner of Grenshaw and Central Park; that he, Greenwald, his partner, Abraham Z. Cohen, and Sam Rubenstein went to the Wilenskys; that he, Greenwald, introduced Rubenstein to Mrs. Wilensky; that "in the meantime" Mrs. Wilensky called him, Greenwald, aside; that he said, "What?" that she said,

[illegible]

"Listen. It is \$31,000;" that he said \$30,000;" that she said, "Tell them it is \$31,000; anything above \$30,000 will be your commission;" that he said, "Are you going back on your word?" that she said, "Before we go any further, it will be \$30,000 net to me." Greenwald testified further that Rubenstein said, "I like the building. I own the store on Kadzie avenue. Let's go back. I will stay in the store. My wife will look at."

Up to this point of Greenwald's testimony it is obvious that Rubenstein had not agreed to buy the property on any terms.

Greenwald further testified that Mrs. Rubenstein went with her husband to look at the property; that she saw the flats; that Rubenstein said, "It needs cleaning;" that he, Greenwald, said, "She says, 'all right.' Let's go back. He will tell you what we will do." Who "she" and "he" refer to is not clear. It may be that "she" refers to Mrs. Wilensky and that "he" refers to Mr. Wilensky. Greenwald continued: "The following day I went over to Mr. Wilensky and once, I believe, about twelve o'clock, I met him at home;" that Wilensky said, "Yes, my wife told me. Whatever my wife says goes;" that he, Wilensky, "would repeat the same thing about the price \$31,000 and he tells me '\$30,000 net to me, \$1,000 will be your commission;" that he, Greenwald, said, "I am satisfied with my commission."

In our interpretation of the testimony, Rubenstein had not yet agreed to pay any definite amount for the property. From Greenwald's testimony it would appear that Greenwald was intent only on showing that his commissions were definitely fixed.

Greenwald testified further that he and Rubenstein and Wilensky met again; that "they fixed the price;" that he, Greenwald, said, "Mr. Wilensky, on my side is everything satisfactory. We will close the contract;" that Wilensky said, "I will let you

"I have been thinking of you very much lately," said the girl, "and I have been wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and I have been wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

[illegible]

It was a very interesting and profitable trip. The weather was very good and the people were very friendly. We saw many beautiful sights and had a very good time. The trip was very successful and we all enjoyed it very much.

know through the agents;" that Wilensky said, "All right, everything is satisfactory, \$31,000, \$10,000 cash, \$200 per month, you have got enough to pay. You have got \$535 from the building;" that Rubenstein said, "All right. Let's make a date for a contract;" that Wilensky said, "I will let you know through the agents."

It will be observed that Rubenstein had not yet definitely accepted any terms for the sale of the property. He merely proposed a date for making a contract.

Greenwald testified that he went to see Wilensky again, but he did not say that Rubenstein went with him. Greenwald testified that he, Greenwald, said, "Mr. Wilensky, can you not tell us now?" that Wilensky said, "No, come back tomorrow;" that he, Wilensky, said, "I will call up my son;" that Wilensky went out of the room and came back in ten minutes and said, "My son says it is worth \$35,000;" that he, Greenwald, said, "You have spoiled the entire deal."

Greenwald testified further that he, Greenwald, endeavored to arrange a meeting again with Wilensky but did not succeed.

On cross-examination in answer to the question, "Did they enter into any written contract with you?" Greenwald made this singular answer: "With me? I was there with my witnesses and so on. We made arrangements as we do on all deals."

From a consideration of Greenwald's entire testimony we are of the opinion that the testimony does not show that Rubenstein definitely accepted any terms of sale of the property.

The testimony of Abraham Z. Cohen is of the same vague, unsatisfactory character as the testimony of Greenwald. Cohen testified that he went with Greenwald to see the Wilenskys; that they saw Mrs. Wilensky; that Greenwald said to her, "I hear

that you want to sell your place;" that she said, "Sure I want to sell my place, because I want to go to California. I am sick;" that they asked her who had charge of the apartments; that she said, "My husband will agree to everything I will do, he is satisfied;" that they asked the price; that she said, "30,000 for the building;" that they asked her what was the rent and that she said \$535 a month; that she said there was a mortgage of "12,000 fourteen months, six per cent.;" that they asked her how much cash she wanted and that she said, "\$10,000 will buy the place;" that she said there was a "balance on second mortgage \$200 a month;" that they told her, "We thought we ought to buy it;" that he, Cohen, and Greenwald took an automobile and brought Rubenstein; that Rubenstein said, "How much do you want for the place?" that she said \$30,000; that Rubenstein said he liked the place; that "right away she said, '\$31,000';" that "they" said, "We come back tonight and see Mr. Wilensky;" that that night "he" asked her, "Why you go back on your own word?" that Wilensky said, "My wife meant \$30,000 net; everything above \$30,000 belongs to you;" that then "We brought him - I think tomorrow it was we brought Rubenstein again to the building. We made the price for \$31,000;" that Wilensky, who was sitting by the table, said "All right;" that Rubenstein asked "when we was to make the contract;" that Mr. and Mrs. Wilensky said to Mr. Rubenstein, "I will let you know through the agent the time to make the contract;" that "they went home and right away after we came back to Wilensky, 'Are you ready to close the contract?'" that Wilensky said, "No, I will ask my son;" that "We asked, 'Why are you going back on your word?'" that Wilensky said "Never mind; this is business; the property is not yours. I am the boss. I can say anything I wish;" that Wilensky "told us to come back tomorrow;" that "we" went back and Wilensky said, "Come a day after;" that "it was dragged along a few days;" that then "We go

and Mr. and Mrs. Wilensky came out and said, 'My son said the building is worth \$35,000; we shall not sell for less than \$35,000.'"

It will be observed that Cohen did not testify that Rubenstein agreed to pay \$31,000. Furthermore, Cohen did not testify that Rubenstein agreed to pay any fixed amount. Cohen testified that Rubenstein asked, "When we was to make the contract."

Rubenstein testified that Greenwald took him to the Wilenskys; that they saw Mrs. Wilensky; that she told him, Rubenstein, "I am going to sell the property. I am sick. I want to go to California. I feel very bad. I am sick here in Chicago about the weather. I will go to California;" that Greenwald told him the price in the presence of Mrs. Wilensky; that Greenwald said he wanted \$31,000; that the "agent" said in the presence of Mrs. Wilensky that the first mortgage was \$12,000; \$10,000 cash, and \$200 each month for the second mortgage; that the second mortgage was \$9,000; that he, Rubenstein, saw Mr. Wilensky once; that Mrs. Wilensky, Greenwald and Cohen were present at the time; that he, Rubenstein, told the Wilenskys he would pay the price \$31,000; that they said, "I will let you know by the agent;" that he never saw either of the Wilenskys after that.

It will be noticed that Rubenstein did not testify that either Wilensky or Wilensky's wife stated that the price of the property was \$31,000. Rubenstein merely testified that Greenwald said in the presence of Mrs. Wilensky that he, Greenwald, "wanted \$31,000." What Mrs. Wilensky said to this is not stated. Her acquiescence in Greenwald's statement could only be inferred. But the subsequent testimony of Rubenstein to the effect that when he told the Wilenskys he would pay \$31,000, the Wilenskys said they would let him know later, shows that the Wilenskys never understood that they had agreed to sell the property for \$31,000.

From a consideration of all of the evidence on behalf of the plaintiffs we are of the opinion that the plaintiffs have not proved by a preponderance of the evidence that the defendants definitely fixed the purchase price at \$31,000, or that the proposed purchaser, Rubenstein, ever actually understood or accepted that amount as the final amount which the defendants agreed to take for the property. Final negotiations were never reached by the parties in regard to the purchase price.

It is unnecessary to state or discuss at length the testimony on behalf of the defendants. Briefly stated the testimony is as follows: Wilensky testified that he never talked to Rubenstein about selling the building; that Rubenstein's testimony was perjury; that he, Wilensky, talked to Greenwald, but stated that he would not sell for less than \$35,000.

Mrs. Wilensky testified that she never saw Rubenstein until she saw him in court at the trial; that Greenwald and Cohen came to her home; that they said somebody sent them and they asked if she wanted to sell the house; that she said, "I don't know anything about whether my husband wants to sell;" that she never stated either to Greenwald or Cohen that she was sick and wanted to go to California; that she had never been out of Chicago; that she did not know when the mortgage was due; that her husband collected the rent and that she never knew how much rent her husband received.

We think the judgment should be reversed with a finding of facts. The case was tried before the court without a jury. Mirich v. Forchner Contracting Co., 312 Ill. 343, 357.

REVERSED WITH FINDING OF FACTS.

McSurely, P. J., and Hatchett, J., concur.

We find that the defendants never fixed the purchase price of the property at \$31,000, and never agreed to sell the property to the prospective purchaser, Rubenstein, at that price; that there never was any definite final agreement on the part of Rubenstein to purchase the property for \$31,000; that negotiations in regard to the purchase price were never consummated.

The first thing that the committee saw when they came to the
 value of the property of 12,000, and later found it was 10,000.
 property to the property of 12,000, and later found it was 10,000.
 that there were not only 12,000 but also 10,000.
 12,000 is not the same as 10,000; it is 12,000.
 In fact, the property is not 12,000 but 10,000.

1910 - 1911

1910 - 1911

4574a

MAX GOLDSTEIN,
Appellant,

vs.

ELI B. FELSENTHAL, WILLIAM F.
STRUCKMAN and HENRY BERGER,
Copartners, Doing Business as
FELSENTHAL, STRUCKMAN AND BERGER,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 621

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Max Goldstein, the plaintiff, from a judgment in favor of Eli B. Felsenthal, William F. Struckman and Henry Berger, the defendants, in an action by the plaintiff alleging that the defendants converted to their own use a diamond belonging to the plaintiff.

The defendants are a firm of lawyers in the City of Chicago. They came into possession of the diamond by virtue of an agreement settling certain litigation in a suit in equity in which, as solicitors, they represented Samuel Epstein, a diamond dealer. By the terms of the agreement the defendants were designated to receive the diamond in question and other diamonds, and were authorized to convert the diamonds into cash and to distribute the cash among the complainants in the suit in equity.

The case was tried by the court without a jury.

The plaintiff, who was a diamond dealer, had done business with Epstein for several years. During that time they had been engaged in transactions amounting approximately to \$1,000,000. On May 14, 1920, Epstein received the diamond in question from the plaintiff on what is termed "memorandum." The memorandum was in printed form and was worded as follows:

"Memorandum.

New York May 14 1920

From
Max Goldstein,
15 Maiden Lane

These goods are sent for your inspection and remain the property of Max Goldstein, 15 Maiden Lane, and are to be returned upon demand.

Sales take effect only from date of approval of your inspection.

brilliant 19 63 at \$375

\$7361

(Signed) S. Epstein"

Because of the ambiguous character of this memorandum

the court permitted the plaintiff and Epstein to testify to what they understood such an agreement to mean. The plaintiff's testimony was as follows:

"I understood by giving him the goods on memorandum that the goods belonged to me and he could only sell them for cash. I understood that he was to go out and sell the stone and that he was to get spot cash for it and then turn the spot cash over to me. He had the right to sell it as a broker. He had the right to throw it in the water if he wanted to as long as I got the cash? He had a right to sell it providing he gave me the cash. He did not have the right to deliver it to any other person on memorandum. He should not even give the stone out of his hands and if he does in such case he applies for a permit to leave the stone on memorandum with some other concern. He has got to ask for permission from the owner and has to mail and give at once the owner a memorandum with the other charge book that same stands on memorandum. Such are our relations in the diamond business. He had the right to sell it for spot cash. He was supposed to mail me or give me at once the money he collected. I asked him and he agreed to give or send me either certified check or the cash."

Epstein testified as follows:

"The memorandum business I have done with Mr. Max Goldstein and others were based on a mutual verbal agreement. That means that whatever I took to Chicago with me, I had the sole alternative to do with the merchandise whatever I pleased. Goldstein and the others had to charge the amount given to me on memorandum against my account, upon the receipt of notification on my part to that effect. If I should get several papers of diamonds from Mr. Goldstein, my understanding that the arrangement being on memorandum was that I could dispose of either the parcel or the whole bill and notify him to credit this up to me. It is immaterial whether it was one stone, one parcel or the entire memorandum. If I broke the parcel, the entire bill was to be charged up against me. After the bill was charged against me and rendered against me I became the owner of the stone."

At the time that Epstein received the diamond in question from the plaintiff he also received other diamonds aggregating

in value approximately \$11,000. The other diamonds, however, are not involved in the plaintiff's action.

On May 18, 1920, Epstein delivered the diamond in question on "memorandum" to a diamond dealer named Oscar H. Bloom. In payment for the diamond Bloom gave his checks to Epstein post-dated June 12, 1920. On May 25, 1920, Bloom pledged the diamond with Arthur Valinets, a jeweler, as collateral security for money Valinets lent to him. Valinets sold the diamond with the consent of Bloom to a man named Flanagan. On June 4, 1920, an involuntary petition in bankruptcy was filed against Bloom. Epstein was a creditor of Bloom to the amount of \$139,000. Epstein retained the defendants to represent him in litigation against Bloom. In an action of replevin begun by Epstein, the diamond in question, which Valinets, with Bloom's consent, had sold to Flanagan, was recovered. Shortly thereafter a bill in equity was filed by Epstein and others charging Bloom, Valinets and others with a conspiracy to defraud Epstein and his co-complainants. In the suit the defendants represented only Epstein. The suit was settled and the agreement previously referred to, by which the defendants obtained possession of the diamond in question, was entered into by the parties to the litigation.

In the view we take of the case the principal question and the only one to be determined, is whether the "memorandum" constitutes a bailment or conditional sale. Counsel for the plaintiff contend that it was clearly a bailment. Counsel for the defendants maintain that it was a conditional sale or sale on approval.

The memorandum is very ambiguous, and the interpretations of its meaning as given in the testimony of the plaintiff and Epstein assist very little in explaining its intent. In our opinion the memorandum should be considered a conditional sale. It was not a bailment as neither by its terms nor by the construction placed on

it by the plaintiff and Epstein was it obligatory on Epstein to return the diamond. Epstein could comply with the provisions of the memorandum by sending checks or cash to the plaintiff. The rule is that "when the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed, but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed - it is a sale." Loneragan v. Stewart, 55 Ill. 44, 49. To the same effect are the following cases: Chickering v. Mistress, 130 Ill. 206, 215; The First National Bank of Elgin v. Schwann, 127 Ill. 573, 578; Independent Brewing Ass'n v. Cocks Brewing Co., 169 Ill. App. 347, 351; Brinton v. Gerry, 7 Ill. App., 238, 245. Counsel for the plaintiff assert that the case of Fleet v. Hartz, 201 Ill. 594, announces a different rule and that the cases above cited "are not as carefully considered" as the case of Fleet v. Hartz. We do not think that the latter case modifies the general rule in regard to bailment as we have stated it.

In our opinion the memorandum was not a sale in praesenti. The title to the diamond did not pass to Epstein immediately, but the title did pass to him after the inspection of the diamond was made and approved by him. Counsel for the plaintiff maintain that the memorandum intended that the approval was to be made by the plaintiff. We do not think that such a construction is a correct one. There would be no apparent reason for the plaintiff to inspect and approve the diamond. Inspection and approval properly should be made by Epstein. Furthermore, the approval and inspection contemplated by the memorandum fix the time when the sale should take effect, and Epstein, not the plaintiff, was to make the sale.

Epstein notified the plaintiff that he had delivered the diamond to Bloom, and Epstein also wrote to the plaintiff requesting him to charge the diamond to his, Epstein's, account with the plaintiff. These acts of Epstein, which indicated that he had inspected the diamond and that the inspection resulted in his approval, converted the sale from a conditional sale ^{to} an absolute one and vested the title to the diamond in Epstein.

We are strengthened in our opinion that the memorandum constituted a conditional sale to Epstein, and that the plaintiff recognized that the title to the diamond had passed to Epstein in view of the plaintiff's conduct in regard to the transaction. The plaintiff knew that Epstein had delivered the diamond to Bloom, and also knew that Bloom had failed in business. Yet the plaintiff waited for about two and a half years before he made any effort to recover the diamond, and during that time never claimed any right or title to the diamond. Furthermore, although the plaintiff delivered to Epstein approximately \$11,000 worth of other diamonds at the same time that he delivered the diamond in question, and on the same memorandum on which the diamond in question was delivered, yet the plaintiff at no time has made any claim to these diamonds and did not include them in the present action against the defendants.

On direct examination Epstein made a statement which might be susceptible of the construction that he considered that the diamond in question belonged to the plaintiff, but on re-direct examination he corrected that impression. In this respect on cross-examination Epstein testified as follows:

"Q. Now, at the time that you instructed Mr. Berger or asked Mr. Berger to bring a replevin suit to obtain possession of this stone, did you tell him that the stone belonged to Mr. Goldstein and that you wanted to get it back to return it to Mr. Goldstein?
A. I did tell him along those lines, yes."

On re-direct examination Epstein stated that the reason he wanted to get the diamond back was to give it to the plaintiff and "get a decrease in his liability" to the plaintiff; that during seven

On the 1st of January 1900, the following was received from the Hon. the Secretary of the Admiralty, London:

"The Admiralty have the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the proposed purchase of the ship 'Albatross' for the service of the Navy, and to inform you that the same has been referred to the Committee on Naval Affairs, and that the Committee have recommended that the ship be purchased for the service of the Navy, and that the same be placed in the hands of the Navy Department for the service of the Navy."

The following is a copy of the letter from the Hon. the Secretary of the Admiralty, London, to the Hon. the Secretary of the Navy, Washington, dated the 1st of January 1900:

"The Admiralty have the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the proposed purchase of the ship 'Albatross' for the service of the Navy, and to inform you that the same has been referred to the Committee on Naval Affairs, and that the Committee have recommended that the ship be purchased for the service of the Navy, and that the same be placed in the hands of the Navy Department for the service of the Navy."

years transactions with the plaintiff, whenever he asked the plaintiff "to charge against" his account, "title was changed immediately;" that occasionally, if he "would like to return one or two stones, memorandum or sold outright," the plaintiff "naturally gave me credit."

Epstein testified further that he did not tell Berger that he wanted to get the diamond back to give it to the plaintiff because he considered that the plaintiff was the owner of the diamond.

The following question was submitted to the trial court: "Was the legal title to the diamond involved in this suit ever vested in Sam Epstein?" The court found as follows: "No."

In view of this finding of the trial court, counsel for the plaintiff contend that since the defendants are seeking to sustain the judgment of the trial court they cannot consistently maintain that the finding of the court was erroneous. It is true that counsel for the defendants maintain that the finding of the court was incorrect, but that the judgment was correct. On the other hand, counsel for the plaintiff contend that the finding of the court was correct but that the judgment was incorrect. From these contrary contentions, it is evident that both counsel for the defendants and counsel for the plaintiff are of the opinion that the judgment is not dependent on the finding; that a different position may be assumed toward the judgment from that taken toward the finding.

We think that the finding of the court involved a mixed question of law and fact, as the determination of the finding depended upon the meaning of the written memorandum, together with the construction placed upon the memorandum by the plaintiff and Epstein. The evidence showed that the plaintiff and Epstein differed in their interpretations of the memorandum. The rule is that if the construction of a written contract depends not only upon the meaning of the words employed, but also upon extrinsic facts or the construction

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which the parties have placed upon it, if the facts are controverted, the question as to what was the contract is a mixed one of law and fact. Carstens Packing Co. v. Sterne & Son Co., 286 Ill., 355, 357, 358.

In reaching a decision as to the finding, the court was not requested to find, and did not find, the specific, extrinsic facts which the court could have considered in connection with the written memorandum. What facts the court considered and what interpretation the court put on such facts the record does not show.

The court was asked to find only, and did find only, the ultimate conclusion of law. In such state of the record we are of the opinion that the finding requested of the court was, in legal effect, a proposition of law. The rule is well established that incorrect rulings by the court on propositions of law are harmless if the judgment is in accordance with the law and the evidence.

Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co., 146 Ill. App. 350, 371; Gary v. Bauder, 202 Ill. App. 58; Commercial State Bank of Forrester v. Folkerts, 200 Ill. App. 385, 391.

We are of the opinion that in the case at bar the judgment is in accordance with the law and the evidence, and that it should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

which the parties have agreed upon. It is the duty of the court to
the parties as to what the contract is a matter of law and
fact. *Restatement (Second) of Contracts*, § 336, 2d ed., 1935.

In reaching a decision as to the meaning of the contract, the court
must consider the facts and the law, and the facts are usually
taken into account with great care in reaching a decision. It is
the duty of the court to consider the facts and the law, and the
facts are usually taken into account with great care in reaching a
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the facts are usually taken into account with great care in reaching
a decision. *Restatement (Second) of Contracts*, § 336, 2d ed., 1935.

RESTATEMENT (SECOND) OF CONTRACTS, § 336, 2D ED., 1935.

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JOSEPH S. SOKOLSKI et al.,
administrators, etc.,
Appellees,

vs.

YELLOW CAB COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

*Arthur
Senior*

238 I.A. 6221

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Yellow Cab Company, the defendant, from a judgment on a verdict in favor of the plaintiff in the sum of \$6750 in an action brought by Joseph S. Sokolski and John M. Klonowski, administrators of the estate of Walter Rutkowski, deceased, to recover damages for the death of Walter K. Rutkowski, who was killed by being struck by a taxicab of the defendant.

The accident occurred in the City of Chicago at the intersection of Wood street and Chicago avenue about 4 or 5 o'clock in the afternoon. Chicago avenue is an easterly and westerly street, and Wood street is a northerly and southerly street.

At the time of the accident the deceased, Walter K. Rutkowski, was seven years and six months of age. When he was hit by the taxicab he was going north across Chicago avenue on Wood street. The taxicab was going west on Chicago avenue. The deceased, together with a number of boys, was following two cowboys who were either leading or riding horses. The cowboys were going north on Wood street near Chicago avenue.

Eight witnesses saw the accident, five testified on behalf of the plaintiff, and three testified on behalf of the defendant.

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TO THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

BY

JOHN H. HANCOCK
Major General

588 11 11 1917

MR. SECRETARY, THE FOLLOWING IS THE REPORT OF THE

COMMISSIONER OF THE ARMY, NOVEMBER 11, 1917.

Reference is made to a report on the subject of the
organization of the Army, dated November 11, 1917.
The report contains a statement of the present
organization of the Army, and a statement of the
proposed reorganization of the Army, and a
statement of the reasons for the proposed
reorganization.

The proposed reorganization of the Army is as follows:

1. The proposed reorganization of the Army is as follows:
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4. The proposed reorganization of the Army is as follows:

Alexander Witt testified on behalf of the plaintiff that he was a hardware clerk; that he saw the accident; that he was on the northeast corner of Wood street and Chicago avenue, starting to cross over Wood street; that he was waiting for the cowboys, who were dressed in cowboy uniforms, to go by; that children were following the cowboys going north; that some of the children were in the middle of the street right after the cowboys, and some were crossing the west crosswalk; that he looked to the east to see if his road was clear to cross, and that he saw nothing coming around the corner; that the only thing he saw coming from the east going west on Chicago avenue was a cab; that the cab was straddling the street car rails; that he noticed no other vehicles coming from the east; that he saw a street car coming from the west going east; that before he stepped off to cross the street he looked around; that he did not keep his eye on the cab from the time he saw the children; that he heard a smash and the first thing he knew he saw a boy running out in the street between the north car tracks, straddling the rail; that after the cab passed the boy the cab made a turn towards the curb and stopped about four lots down; that the boy lay about 15 feet away from the cross-walk, west of it; that he judged that the cab was running about 25 or 30 miles an hour; that he did not notice any change in speed until after the boy was struck; that he did not see any signal or warning before the boy was struck; that after the boy was struck a dozen boys scattered in all directions.

Kate Glazer testified on behalf of the plaintiff that she was a housewife and had a grocery business; that she saw the accident; that she was in the grocery store when the cowboys passed; that she went out of the grocery store to the northeast corner of Chicago avenue and Wood street, and was starting to cross Chicago avenue going to the south; that she saw a Yellow cab not quite a block from her coming "too fast, too fast," and that she

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my very bones. I shivered as I walked towards the entrance of the building, my hands tucked into my pockets. The air was thick with the scent of old stone and the faint, distant smell of the city. I had heard that the place was haunted, but I had never believed it until now. The building itself was a masterpiece of gothic architecture, with its dark, arched windows and intricate carvings. As I approached the main entrance, I felt a strange sense of foreboding. The door was made of heavy, dark wood, and it seemed to have a life of its own. I hesitated for a moment before reaching out to touch the handle. The moment my fingers touched the wood, a cold, icy hand seemed to grip mine. I jerked back, my heart pounding in my chest. The door opened with a creak, revealing a dark, shadowy interior. I stepped inside, my eyes adjusting to the dim light. The hall was long and narrow, with a high ceiling and a floor of polished stone. The walls were covered in tapestries of various patterns and colors. I walked down the hall, my footsteps echoing off the walls. At the end of the hall, there was a large, ornate doorway. I pushed it open, and I found myself in a grand, vaulted room. The room was filled with furniture of various styles, from old, leather-upholstered chairs to modern, sleek sofas. The lighting was soft and warm, coming from large, ornate chandeliers. I walked towards the center of the room, my eyes taking in the details of the architecture. The room was a perfect blend of old and new, a place where time seemed to stand still. I had found a place where I could finally relax, a place where I could finally be at home.

stopped to wait for it; that she saw no automobile or street car or anything coming from the same direction as the cab; that she saw a "bunch of kids" on the southwest corner trying to go across from the southwest corner to the north; that she did not see anything else on Wood street; that a boy passed her; that then she looked towards the west and saw "a kid rolling around in the street outside the street car tracks;" that she did not see the cab hit the boy; that when she looked up and saw the boy lying there the cab was going further on; that the cab stopped four houses from the corner; that she could not judge the speed of the cab in miles per hour; that she did not hear the signal or horn or anything before she saw the boy there.

Joseph Metyka testified on behalf of the plaintiff that he would be 17 years of age on July 1; that he was working; that he saw the accident; that he saw a parade of boys following two cowboys, who had on uniforms and who were going north crossing Wood street and Chicago avenue; that some of the boys were in the street, some on the sidewalk, some going north; that he saw the cab a half a block away; that it was on the north side of Chicago avenue and not on the car tracks; that he saw no other traffic coming from the east; that he first saw the boy when the boy was about to cross the west bound car track; that the boy was going north and was about to step into the east bound track; that the boy was with a "bunch of kids;" that they kept on moving then and all of a sudden the cab was coming - not stopping at the corner - at the same speed; that the boy started jerking everybody and two kids got on that side and a couple on this side; that the boy was dancing or something, tried to jerk out, got in front of the car and was hit; that the front of the car struck the boy and then the car ran over him; that the cab did not stop; that it went about four or five doors; that when the cab came the boys tried to duck and get away without being hit; that the cab was going very fast; that he cannot tell the speed in miles

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per hour; that he did not hear a horn or anything; that he did not see any street cars coming either way on Chicago avenue.

Casper Kubala, a witness 14 years of age, testified on behalf of the plaintiff substantially the same as the preceding witnesses. He stated that the front fender of the cab dragged the boy about 10 feet.

Maurice Martens, a witness 14 years of age, testified on behalf of the plaintiff substantially the same as the preceding witnesses. In his opinion the cab was going at the rate of 25 miles an hour.

On behalf of the defendant William Bruce Becker testified that he was a chauffeur, and that the last place at which he was employed was with the defendant; that he saw the accident; that he was standing on the southwest corner of Chicago avenue and Wood street; that when he first saw the cab it was going west behind a westbound street car; that the street car stopped at Wood street; that when he started up he noticed the cab following it; that he did not see the boy struck; that he knew it was going to happen and turned his back; that before he turned his back he saw the boy run; that he ran from the southeast corner of Chicago avenue and Wood street and darted across "on an angle like" going north; that at the time the boy was struck he saw the cowboy and two horses about a half a block north of Chicago avenue; that there were quite a number of children following after the cowboy and horses.

Lewis Mincer testified on behalf of the defendant that he was the chauffeur of the cab that struck the boy; that he was driving his cab in the street car track going west on Chicago avenue; that he had a woman in the cab; that there was a street car ahead of him; that when he approached Wood street the street car stopped and he stopped also; that he started up when the street car started; that he did not see the boy before the

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accident; that he, the chauffeur, kept behind the street car up to the time of the accident; that he was about 30 or 40 feet behind the street car; that the first thing he noticed as he was following the street car was a boy along side of it just as like you would see a cat or dog spurring across; that he put on his brakes, swerved to the side, and then noticed that there was a child hit about the center or towards the rear of the cab on the left side, the left side rear fender; that the child was never in front of the cab; that he, the chauffeur, stopped suddenly, stopped within two or three feet; that he saw something like a cowboy on a horse going along Wood street, going north, passed him north of Chicago avenue just as he was passing there; that he did not see any children or persons crossing the street there at the west crosswalk or between there and where the child was hit; that he should judge that he was driving between 10 and 15 miles an hour; that there was no obstruction except the street car ahead of him.

Frank Henry Ellis testified on behalf of the defendant that he was a motorman for the Chicago Surface Lines; that he saw the accident; that he was in the street car going east on Chicago avenue; that when he first saw the boy, he, the boy, was standing in the street in the center of it between the curb and the street car track; that there was no one with the boy; that there was an east bound car just ahead of him, the witness; that he did not notice any west bound car; that the boy ran across the street in front of his car; that his car was about 15 feet or so from the boy when he ran in front of the car; that the boy ran directly north, the cab was coming along, and the boy ran into the cab, towards the middle of it; that the boy fell backwards; that he was lying about 25 feet west of the crosswalk; that it all happened in a second or two.

Counsel for the defendant contend that the evidence

shows that there "was a mere accident which occurred without negligence on the part of the defendant." In our opinion there is sufficient evidence to sustain the verdict of the jury that the defendant was guilty of negligence.

It is further contended by counsel for the defendant that the deceased was guilty of contributory negligence.

We are of the opinion that he was not guilty of ^{contributory} negligence as a matter of law; that the question whether he was guilty of contributory negligence was one of fact for the jury; and that there is sufficient evidence to support the finding of the jury that he was not guilty of contributory negligence.

The general rule in regard to contributory negligence, as stated in Kelly v. Chicago City Ry. Co., 283 Ill. 640 is as follows (p. 645):

"As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence. (Rals v. Chicago Junction Railway Co., 259 Ill. 476), but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for defendant."

In considering the rule of contributory negligence in connection with a child, in the case of Harrison v. Flowers, 308 Ill. 189, the court said (p. 197):

"When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury; but if one is running his automobile at a speed in excess of the statutory limit or at an unreasonable or dangerous speed, he cannot escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was then unavoidable."

In the case of Johnson v. City of St. Charles, 200 Ill. App. 184, the court said (p. 189):

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The general rule in regard to non-competitor cases is stated in In re

(1980) 67 Cal. App. 3d 1000.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

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"What a ten-year-old boy of the kind and character pictured in legal definitions would naturally and ordinarily do is a question that laymen are quite as well qualified to answer as are judges and lawyers. It involves a consideration of many factors. No fixed rule can be applied even in cases of children of equal age and natural capacity."

Sherman & Redfield state that "In nearly all of the cases the power and duty of any child between three and twelve years of age, to exercise care for its own protection is held to be for the jury." Sherman & Redfield on The Law of Negligence, Vol. 1, Section 73a, pp. 187, 188 (6th Ed.).

Counsel for the defendant further contend that the mother of the deceased and the next of kin were guilty of contributory negligence in not exercising due care for the safety of the deceased.

We do not think that we could hold as a matter of law that the mother and next of kin were guilty of contributory negligence. The question was one of fact for the jury, and we are of the opinion that the finding of the jury should not be disturbed.

The evidence shows that the deceased was 7 years and 6 months of age; that he was an intelligent, healthy boy; that he was in his second grade in the public school; that his mother saw him in the morning before she went to work; that he was getting dressed to go to school; that the accident happened between 4 and 5 o'clock in the afternoon. In the circumstances the jury properly could find that the deceased was able to take care of himself and did not require constant care and supervision.

In the case of Chicago City Ry. Co. v. McKeon, 143 Ill. App. 598, in considering the question of contributory negligence of a parent, the court said (p. 604): "It certainly cannot be held, as a matter of law, that it was contributory negligence in a parent not to forbid or prevent an eleven-year-old child 'in the habit of doing errands for her mother,' taking, in full daylight, her three-year-old sister with her to the dairy 'for company.' Nor can it be said that the very natural condition of

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will then gather information about the problem and the people involved. This information will be used to develop a plan of action.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

* 1980-1989: 1981, 1982, 1987, 1988, 1989

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Continued on next page

1. The purpose of this study is to determine the effect of the use of the computer on the learning of the English language.

THESE ARE THE RESULTS OF THE INVESTIGATION CONDUCTED BY THE BUREAU OF THE ARMY AND NAVY DEPARTMENT.

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IN THE NAME OF GOD THE MOST GRACIOUS AND MOST MERCIFUL

1992

1950-1951

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very long letter, and it contains a great deal of information about the state of the country at that time. It is a very important document, and it is one of the most interesting documents in the collection.

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things, by which the 'eldest girl in the family' used 'to sort of look after Alice for their mother,' is proof of negligence on the parent's part generally or on this occasion in particular."

In the case of West Chicago St. Ry. Co. v. Lidaman,

187 Ill. 463, in discussing the question of care that parents in cities should exercise over their children, the court said (p. 471):

"It is undoubtedly the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets; but the standard of such care is not capable of being defined by the law, and each case must depend upon its own facts and circumstances. That it is not negligence per se to permit infants to be upon the streets of a city was held by this court in City of Chicago v. Major, 16 Ill. 349."

Counsel for the defendant contend that the declaration does not state a cause of action because it fails to allege that the next of kin of the deceased "exercised ordinary or any care" over the deceased.

It is true that the declaration does not allege that the next of kin were in the exercise of reasonable care for the safety of the deceased. But in our opinion the defect was cured by reason of the fact that one of the issues presented to the jury was whether the next of kin were guilty of contributory negligence. This question was submitted to the jury by an instruction given by the court at the request of the defendant. The instruction was as follows:

"The court instructs the jury that if they believe from the evidence that any one or more of the next of kin of the deceased was guilty of any want of ordinary care which proximately contributed to bring about the accident and death in question, then the plaintiff cannot recover in this case."

In the case of The Illinois Central Railroad Co. v.

Harrison, 239 Ill. 91, which involved an objection similar to one urged by counsel for the defendant in the case at bar, the court said (p. 97):

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Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2

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OF MEDICAL HISTORY OF HAWAII, 1892-1900, 1901-1910, 1911-1920, 1921-1930, 1931-1940, 1941-1950, 1951-1960, 1961-1970, 1971-1980, 1981-1990, 1991-2000, 2001-2010, 2011-2020, 2021-2030, 2031-2040, 2041-2050, 2051-2060, 2061-2070, 2071-2080, 2081-2090, 2091-2100, 2101-2110, 2111-2120, 2121-2130, 2131-2140, 2141-2150, 2151-2160, 2161-2170, 2171-2180, 2181-2190, 2191-2200, 2201-2210, 2211-2220, 2221-2230, 2231-2240, 2241-2250, 2251-2260, 2261-2270, 2271-2280, 2281-2290, 2291-2300, 2301-2310, 2311-2320, 2321-2330, 2331-2340, 2341-2350, 2351-2360, 2361-2370, 2371-2380, 2381-2390, 2391-2400, 2401-2410, 2411-2420, 2421-2430, 2431-2440, 2441-2450, 2451-2460, 2461-2470, 2471-2480, 2481-2490, 2491-2500, 2501-2510, 2511-2520, 2521-2530, 2531-2540, 2541-2550, 2551-2560, 2561-2570, 2571-2580, 2581-2590, 2591-2600, 2601-2610, 2611-2620, 2621-2630, 2631-2640, 2641-2650, 2651-2660, 2661-2670, 2671-2680, 2681-2690, 2691-2700, 2701-2710, 2711-2720, 2721-2730, 2731-2740, 2741-2750, 2751-2760, 2761-2770, 2771-2780, 2781-2790, 2791-2800, 2801-2810, 2811-2820, 2821-2830, 2831-2840, 2841-2850, 2851-2860, 2861-2870, 2871-2880, 2881-2890, 2891-2900, 2901-2910, 2911-2920, 2921-2930, 2931-2940, 2941-2950, 2951-2960, 2961-2970, 2971-2980, 2981-2990, 2991-3000, 3001-3010, 3011-3020, 3021-3030, 3031-3040, 3041-3050, 3051-3060, 3061-3070, 3071-3080, 3081-3090, 3091-3100, 3101-3110, 3111-3120, 3121-3130, 3131-3140, 3141-3150, 3151-3160, 3161-3170, 3171-3180, 3181-3190, 3191-3200, 3201-3210, 3211-3220, 3221-3230, 3231-3240, 3241-3250, 3251-3260, 3261-3270, 3271-3280, 3281-3290, 3291-3300, 3301-3310, 3311-3320, 3321-3330, 3331-3340, 3341-3350, 3351-3360, 3361-3370, 3371-3380, 3381-3390, 3391-3400, 3401-3410, 3411-3420, 3421-3430, 3431-3440, 3441-3450, 3451-3460, 3461-3470, 3471-3480, 3481-3490, 3491-3500, 3501-3510, 3511-3520, 3521-3530, 3531-3540, 3541-3550, 3551-3560, 3561-3570, 3571-3580, 3581-3590, 3591-3600, 3601-3610, 3611-3620, 3621-3630, 3631-3640, 3641-3650, 3651-3660, 3661-3670, 3671-3680, 3681-3690, 3691-3700, 3701-3710, 3711-3720, 3721-3730, 3731-3740, 3741-3750, 3751-3760, 3761-3770, 3771-3780, 3781-3790, 3791-3800, 3801-3810, 3811-3820, 3821-3830, 3831-3840, 3841-3850, 3851-3860, 3861-3870, 3871-3880, 3881-3890, 3891-3900, 3901-3910, 3911-3920, 3921-3930, 3931-3940, 3941-3950, 3951-3960, 3961-3970, 3971-3980, 3981-3990, 3991-4000, 4001-4010, 4011-4020, 4021-4030, 4031-4040, 4041-4050, 4051-4060, 4061-4070, 4071-4080, 4081-4090, 4091-4100, 4101-4110, 4111-4120, 4121-4130, 4131-4140, 4141-4150, 4151-4160, 4161-4170, 4171-4180, 4181-4190, 4191-4200, 4201-4210, 4211-4220, 4221-4230, 4231-4240, 4241-4250, 4251-4260, 4261-4270, 4271-4280, 4281-4290, 4291-4300, 4301-4310, 4311-4320, 4321-4330, 4331-4340, 4341-4350, 4351-4360, 4361-4370, 4371-4380, 4381-4390, 4391-4400, 4401-4410, 4411-4420, 4421-4430, 4431-4440, 4441-4450, 4451-4460, 4461-4470, 4471-4480, 4481-4490, 4491-4500, 4501-4510, 4511-4520, 4521-4530, 4531-4540, 4541-4550, 4551-4560, 4561-4570, 4571-4580, 4581-4590, 4591-4600, 4601-4610, 4611-4620, 4621-4630, 4631-4640, 4641-4650, 4651-4660, 4661-4670, 4671-4680, 4681-4690, 4691-4700, 4701-4710, 4711-4720, 4721-4730, 4731-4740, 4741-4750, 4751-4760, 4761-4770, 4771-4780, 4781-4790, 4791-4800, 4801-4810, 4811-4820, 4821-4830, 4831-4840, 4841-4850, 4851-4860, 4861-4870, 4871-4880, 4881-4890, 4891-4900, 4901-4910, 4911-4920, 4921-4930, 4931-4940, 4941-4950, 4951-4960, 4961-4970, 4971-4980, 4981-4990, 4991-5000, 5001-5010, 5011-5020, 5021-5030, 5031-5040, 5041-5050, 5051-5060, 5061-5070, 5071-5080, 5081-5090, 5091-5100, 5101-5110, 5111-5120, 5121-5130, 5131-5140, 5141-5150, 5151-5160, 5161-5170, 5171-5180, 5181-5190, 5191-5200, 5201-5210, 5211-5220, 5221-5230, 5231-5240, 5241-5250, 5251-5260, 5261-5270, 5271-5280, 5281-5290, 5291-5300, 5301-5310, 5311-5320, 5321-5330, 5331-5340, 5341-5350, 5351-5360, 5361-5370, 5371-5380, 5381-5390, 5391-5400, 5401-5410, 5411-5420, 5421-5430, 5431-5440, 5441-5450, 5451-5460, 5461-5470, 5471-5480, 5481-5490, 5491-5500, 5501-5510, 5511-5520, 5521-5530, 5531-5540, 5541-5550, 5551-5560, 5561-5570, 5571-5580, 5581-5590, 5591-5600, 56

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

"It is urged that neither of the counts submitted to the jury state a cause of action, for the reason that they did not allege that the parents of the child were in the exercise of reasonable care for his safety. They allege that it was by and through the negligence and improper conduct of the defendant and the great and unlawful speed of the train that the deceased was struck and injured. It is fairly inferable from the allegations of those counts that the accident was not due to negligence or want of care of the parents of the child, and the issue joined under the plea of not guilty was such as necessarily required proof of the omitted fact. The defect was cured by verdict."

It was similarly held in the analogous case of Lyons v. Kanter, 285 Ill. 336. In that case a statement of claim in an action in the Municipal Court for malicious prosecution did not show that there was no probable cause for the prosecution, and the court said (p. 339):

"It was not an immaterial issue, for, although it was not alleged, the plaintiff could not recover without proving it, and the record shows that evidence was introduced by each of the parties on that issue. The instructions are not abstracted, but it is to be presumed that the court instructed the jury on that issue. The issue was introduced by the defendants instead of the plaintiff, but we will not, with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial."

Counsel for the defendant maintain that the case of the Illinois Central Railroad Co. v. Warriner, supra, was overruled by the subsequent case of Walters v. The City of Ottawa, 240 Ill. 259. The case of the Illinois Central Railroad Co. v. Warriner was not considered in the case of Walters v. The City of Ottawa, but counsel for the defendant contend that the former case was overruled by necessary implication by the latter. We do not think that the contention of counsel for the defendant is correct. The two cases are materially different. In the case of Walters v. City of Ottawa the court held that the declaration did not state a cause of action because the declaration failed to allege that the notice required by the statute relating to personal injuries was not given to the City, and that the defect in the declaration was not cured by the verdict. In that case, however, the question

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

It is a very common mistake to think that the only way to get a good result is to use a lot of force. In fact, the best results are often obtained by using a little force and a lot of patience. The key is to be consistent and to keep at it until you see the results you want.

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whether the notice was given to the City was not submitted to the jury by an instruction. After stating the general rule in regard to a verdict as to when a presumption will be indulged that a fact not alleged in the declaration was proved on the trial, the court said (p. 255):

"There is no allegation in either of the original counts having even remote reference to the notice, - nothing from which the giving of notice can be implied. It could not, therefore, if a verdict had been rendered on these counts, be presumed to have been proved and the declaration would not have been sufficient to support a judgment. A motion in arrest of judgment must necessarily have been sustained."

In the case at bar in order that the defect in the declaration may be cured by verdict, it is not necessary to resort to a presumption that on the trial there was an issue on the question of the contributory negligence of the next of kin, as the record shows as an affirmative fact that there was such an issue and that the issue was raised by the defendant. In the language of the court in the case of Lyons v. Kauter, supra. (p. 339), "we will not, with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial."

It is further contended by counsel for the defendant that the trial court committed reversible error in giving the following instruction requested by the plaintiff:

"The court instructs the jury that if from a preponderance of the evidence and under the instructions of the court you find the defendant guilty as charged in the plaintiff's declaration, then in assessing the damages, if any, you have a right to take into consideration all of the testimony bearing upon that question, and allow such damages as you may deem a fair and just compensation with reference to the pecuniary injuries, if any, resulting from the death of plaintiff's intestate, to his next of kin, and in assessing the plaintiff's damages you have a right to take into consideration whatever, if anything, you may believe from a preponderance of the evidence his next of kin might have reasonably expected in a pecuniary way from the continued life of said deceased."

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20246

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THE UNIVERSITY OF CHICAGO

any of the above for the purpose of determining the value of the property.

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and he said all he wanted was justice and to make my

THESE RESEARCH RESULTS HAVE BEEN PRESENTED AT THE 1997 INTERNATIONAL SYMPOSIUM ON THE PHYSICS OF HIGH-TEMPERATURE SUPERCONDUCTORS, BEIJING, CHINA, AND AT THE 1997 INTERNATIONAL SYMPOSIUM ON THE PHYSICS OF HIGH-TEMPERATURE SUPERCONDUCTORS, BEIJING, CHINA.

There are no other persons named in the document.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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SECRET

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... ..

In support of their objection to this instruction counsel for the defendant argue that "under this instruction the jury were justified in finding a verdict against the defendant, regardless of the element of care on behalf of the next of kin, there being no averment of the exercise of care on the part of the next of kin in any count of the declaration."

In view of the fact that the issue as to whether the next of kin were guilty of contributory negligence was submitted to the jury by an instruction given by the court at the request of the defendant, we do not think that the court erred in giving the instruction in question.

For the reasons stated in the opinion the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

ROMAN F. KRAMER and OLGA
KRAMER,

Appellee,

vs.

JOHN KEALY,

Appellant.

4576a
APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

238 I.A. 622²

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of trespass brought by Roman F. Kramer and his wife, Olga Kramer, the plaintiffs, to recover damages from John Healy, the defendant, on the ground that Healy unlawfully and maliciously broke into the flat of the plaintiffs and removed certain household goods and furniture.

The case was tried before a jury. The trial court instructed the jury to find the defendant guilty and to determine the amount of the damages. The instruction was as follows:

"The court instructs the jury to find the defendant guilty and the only question for you to determine is the amount of damages to be assessed against the defendants."

The defendant was the owner of the flat and had rented it to the plaintiffs.

It is the contention of the defendant that he entered the flat peaceably with the consent of the plaintiffs; and that at the time of his entry the plaintiffs had abandoned possession of the flat and did not intend to resume possession.

Counsel for the defendant maintain that the court committed reversible error in peremptorily instructing the jury to find the defendant guilty.

We are of the opinion that the contention of counsel for the defendant is correct.

The rule is that it is only proper to give a peremp-

tory instruction to find for the plaintiff when there is no evidence tending to support any defense. Union Surety & Guaranty Co. v. Tenney, 200 Ill., 349, 354. If the facts are conceded or if there is no dispute with reference to the facts, and all reasonable men will agree from the evidence on the legitimate conclusions to be drawn from the evidence, then the question becomes one of law and not of fact. (Sturm v. Consolidated Coal Co., 248 Ill. 20, 28.) It is the rule that "the party against whom the motion is directed is entitled to the benefit of all the evidence in his favor in its most favorable aspects to him, and of all presumptions that may be reasonably drawn from such evidence." Yess v. Yess, 255 Ill. 414, 418. All contradictory evidence or explanatory circumstances must be rejected. Yess v. Yess, *supra* (p.418); Easton Farmers Grain Co. v. Fernandes Grain Co., 259 Ill. App. 102, 107. In regard to directed verdicts in favor of a defendant, it is the rule that a motion to instruct the jury to find for the defendant is in the nature of a demurrer, and that all reasonable inferences arising from the evidence must be taken most strongly in favor of the plaintiff. McGuns v. Reynolds, 288 Ill. 188, 190. The same principle obviously applies to directed verdicts in favor of the plaintiff.

In the case at bar the trespass is alleged to have been committed on May 17, 1920. There is evidence tending to show that the plaintiff, Roman F. Kramer, did work for the Hool Realty Company in connection with securing for them exclusive contracts for the sale of real estate; that the building owned by the defendant in which the plaintiffs were living, was listed for sale with the Hool Realty Company; that Kramer was purchasing a house, and that a man named Folkman, who was employed by the Hool Realty Company, was Kramer's real estate broker; that Folkman had a conversation with Kramer in the early part of May, 1920, in which Folkman asked Kramer if he would move out of the defendant's building so that he,

Folkman, could sell the building; that Kramer said that he would move out so that "the other man could move in;" that after this conversation Kramer purchased a building about May 20, 1920, and that later he and his family moved into the building. There is also evidence tending to show that the plaintiffs moved out of the defendant's building on May 14, 1920; that they left the key of the flat with a tenant in the building with the understanding that the tenant was to deliver the key to the defendant; that the defendant got the key from the tenant and entered the flat by means of the key; that before the plaintiffs left the flat they packed their dishes and small utensils in boxes, barrels and a wash boiler, and put their furniture in the front room; that there was no furniture in any of the other rooms.

The tenant with whom the key was left was unable to testify positively who gave her the key. The direct evidence that the plaintiffs left the key of the flat with the tenant to be delivered by the tenant to the defendant rests largely on testimony that Mrs. Kramer gave in another proceeding growing out of the alleged trespass. In that proceeding her testimony was taken by a stenographer and on the trial in the case at bar the stenographer read the transcript of Mrs. Kramer's testimony. The pertinent part of her testimony is as follows:

"Q. You moved out on the 14th. A. Yes, sir.

Q. The lady upstairs told you the landlord asked you to give her the key? A. Yes, sir.

Q. You gave the key to the lady upstairs?

A. Yes, I gave it to her."

The transcript of Mrs. Kramer's testimony in the former proceeding also showed the following evidence in regard to the plaintiffs moving out of the flat:

"Q. Where did you go to live on the 14th?

A. With my mother to accommodate these people, yes to accommodate Mr. Nealy too.

Q. And the stuff you left in the flat was packed up for shipping, left in the living room? A. Yes.

Q. And you did not pay anybody for the purpose of leaving

your stuff there?

A. No, and I accommodated Mr. Healy.

Q. You mean Mr. Healy here? A. Yes."

These admissions made by Mrs. Kramer in the former proceeding are substantive evidence against the plaintiffs. Johnson v. Peterson, 166 Ill. App. 404, 405; Stump v. Dudley, 285 Ill., 46, 47; Miller v. Peoria, 216 Ill., 309, 311, 312; Wheat v. Summers, 13 Ill. App., 444, 448, 449. On the trial in the case at bar Mrs. Kramer denied making some of the statements and did not remember making others. The weight and credibility of her testimony, however, were matters for the jury and properly could not be considered on a motion to direct a verdict in favor of the plaintiffs.

We are of the opinion that on the evidence which we have stated, after all reasonable inferences and intendments are indulged, the evidence tends to support a defense, and that, therefore, the trial court erred in not submitting the case to the jury.

Counsel for the defendant contend that the evidence does not show that the plaintiffs were joint owners of the property, and that therefore they were improperly joined as plaintiffs. As the cause is to be remanded for another trial we shall express no opinion on the evidence in this respect.

Counsel for the plaintiffs contend that the defendant has not been prejudiced by the giving of the peremptory instruction to the jury to find in favor of the plaintiffs "for the reason that the question of the defendant's guilt so far as his entry upon the premises was concerned," was submitted to the jury by a special interrogatory requested by the defendant, and that the answer of the jury was adverse to the defendant. The contention of counsel for the plaintiffs is without merit, since, in view of the peremptory instruction to the jury to find the defendant guilty, the jury consistently could not have answered the special interrogatory in any other way. It was not proper for the court to submit the special

THE COURT OF APPEALS
IN THE SECOND DEPARTMENT
JANUARY 18, 1907

THE COURT OF APPEALS, in the second department, has affirmed the judgment of the court of sessions in the case of *People v. [Name]*, 100 App. Div. 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

interrogatory to the jury after having given the peremptory instruction.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Hatchett, J., concur.

INTERCOMMITTEE OF THE CITY OF NEW YORK AND THE DISTRICT OF COLUMBIA

FOR THE PURPOSE OF SECURING THE BEST INTERESTS OF THE PEOPLE OF THE CITY OF NEW YORK AND THE DISTRICT OF COLUMBIA

RESOLUTIONS AND RECOMMENDATIONS

ADOPTED BY THE INTERCOMMITTEE AT ITS MEETING HELD ON THE 17TH DAY OF JANUARY, 1907

1907-57

THE DISTRICT OF COLUMBIA

OFFICE OF THE DISTRICT COMMISSIONER

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PETER WEINER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

233 I.A. 622³

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was tried on an information which charged that he, on June 9, 1923, knowingly and unlawfully had in his possession, with intent to sell the same, certain lottery tickets, commonly known as baseball pool tickets, contrary to the form of the statute, etc.

The jury returned a verdict of guilty in manner and form as charged, and motions for a new trial and in arrest were overruled, judgment entered upon the verdict and a fine of \$1,000 and costs imposed.

It is urged that the judgment should be reversed for the reason the court received evidence which was incompetent because obtained by means of an unlawful search and seizure.

The record fails to show that there was any motion to quash until the trial had been under way for more than two days. Courts do not stop trials to ascertain whether evidence offered has been illegally obtained. Objection to evidence on that ground should be made by motion to quash or suppress prior to the beginning of the trial. Gindrat v. People, 138 Ill., 103; Bisbert v. People, 143 Ill., 571; Trask v. People, 151 Ill. 523; People v. Brocamp, 307 Ill. 446, 454.

It is also urged the judgment should be reversed because of improper remarks made by the State's attorney and also because of improper remarks in the presence of the jury by the trial Judge. The defendant did not testify in his own behalf.

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The record discloses that, in the closing argument to the jury, the State's attorney said:

"The defendant in this case did not see fit to take the witness stand and I am not allowed to comment on that thing."

The attorney for the defendant said:

"Your honor, that is commenting on it, if you please."

"Mr. Moran: Oh, no, I have not said a thing."

"Mr. Roemer: It makes it difficult for me to sit here--"

"The Court: Objection sustained."

Section 734, chapter 38, Smith-Hurd Illinois. Rev. Stat. 1923, provides that a defendant's "neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." This statute has been construed so often by the courts of this state and the law on the subject is so clear and explicit that it should be unnecessary to restate it.

In Angelo v. People, 96 Ill., 209, where it was claimed the reference to defendant's failure to testify in his own behalf had been inadvertently made, the court said:

"Such comments are prohibited by the statute, and it is strange that any attorney should so far forget the rights of the accused, and his professional duty, for a moment, even in the heat of discussion; but he said it was inadvertent, and we are loth to believe that any attorney would intentionally act so unfairly and unprofessionally. *** And who can say that this inadvertence may not have produced the verdict of guilty?"

In Austin v. People, 102 Ill. 261, the trial court, in a case where the defendant failed to testify, allowed a prosecutor to argue that Lord Hale's suggestions as to the caution to be exercised by juries in a certain class of cases were no longer applicable since a statute had been passed giving the defendant in criminal cases the right to testify in his own behalf. The court said:

"The letter and spirit of this statute were both obviously violated in these proceedings."

The record reflects that in the hearing conducted on the 10th

the 10-10-10 hearing was:

"The following in this case was read and the 10-10-10 hearing was held and I am not allowed to comment on the 10-10-10 hearing."

The following are the statements made:

"Your Honor, I am in agreement with the 10-10-10 hearing."

"Mr. Justice, I am, I have not said a thing."

"Mr. Justice, I am in agreement with the 10-10-10 hearing."

"The 10-10-10 hearing was held."

"Justice, I am, I have not said a thing."

"Justice, I am, I have not said a thing."

and Justice has not said a thing."

any reference to the 10-10-10 hearing."

This hearing was held on the 10-10-10 hearing."

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It should be understood to Justice."

In Justice v. Justice, 10-10-10, where it was

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Justice, I am, I have not said a thing."

The court also said:

"We do not see that this statute can well be completely enforced unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial, in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

In Baker v. People, 105 Ill. 452, at the request of the prosecutor, the trial court instructed the jury that, in this State, every defendant was permitted to testify in his own behalf if he so desired; that defendant in that case had not testified. The Supreme court said:

"We can but regard it as an adroit device on the part of counsel to have the court, under the guise of giving the law to the jury, call their attention specifically to the fact that the plaintiff in error, although he had an opportunity of doing so, had declined to testify in his own behalf."

In Jackson v. People, 18 Ill. App. 508, this court said:

"The allusion of the special counsel who assisted the prosecution in this case, to the fact that the defendant did not testify, was covert, unprofessional, and in direct violation of the statute, and deserving of the severest condemnation."

In Quinn v. People, 123 Ill. 333, discussing this provision of the statute, the court said:

"In giving a construction to this section of the statute, and earnestly endeavoring to enforce it in its true spirit and intent, this court has spoken in no uncertain tones."

In Watt v. People, 126 Ill. 9, the Supreme court said of this section of the statute:

"It is no doubt the duty of the circuit court in all criminal trials, when the defendant does not testify in his own behalf, to see to it that the mandate of the statute is strictly enforced. Indirect and covert references to the neglect of the defendant to go upon the witness stand may be as prejudicial to his rights as a direct comment upon such subject."

In Gilmore v. People, 87 Ill. App. 128, this court stated:

"In every case where this question has been presented to our Supreme court (so far as we are advised), if there had been a direct reference by the State to the failure of the defendant to testify, it has been held to require a reversal, unless the

guilt of the defendant was so evident that the jury could have reached no other conclusion."

Later cases are People v. McMahon, 244 Ill., 45;

People v. Eastes, 261 Ill., 156; People v. Carter, 189 Ill. App. 22; and People v. Hall, 212 Ill. App. 144. In view of this wealth of authority, the comment of the State's attorney in this case is indeed remarkable and constituted error which makes a reversal mandatory.

Moreover, the record discloses that the trial Judge, in the presence of the jury, commented upon the weight of the evidence, and by his comments indicated an opinion from which the jury might have inferred that he thought the evidence sufficient to establish the defendant's guilt. This is error which would require a reversal. Kennedy v. People, 44 Ill. 283; Feinberg v. People, 174 Ill. 609; Kerrish v. People, 29 Ill. 90; Briggs v. People, 219 Ill. 330; Cunningham v. People, 195 Ill., 550. Other alleged errors are argued; these it will be unnecessary to discuss.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

any other way than by the use of the word "and" in the first sentence of the first paragraph of the first section of the act.

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Journal of Interpersonal Violence 28(10)

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of authority. The concept of the leader is always in the eye of the beholder.

Labels provided for identification and reference only

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Also see the other 44 pages of the report and the summary of it.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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For the present purposes the following is relevant:

(continued)

... ..

LOIS H. NELLESEN,
Appellee,

vs.

FERDINAND F. NELLESEN,
Appellant.

4578
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

238 I.A. 622⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause is now before us on rehearing granted.

As stated in the former opinion, the appeal is by the defendant from a decree in favor of the complainant, his wife, who filed a bill for separate maintenance, and the decree finds that the complainant is living separate and apart from her husband without fault on her part, and allows alimony in the sum of \$45 a week and solicitor's fees in the sum of \$1,000.

The record shows that the complainant and defendant were married June 1, 1922, and lived together until May 16, 1923, when she left their home, as she says, after defendant swore at her and ordered her to leave.

The bill avers that complainant left defendant because of his cruel and inhuman conduct; that it was unsafe for her to remain with him; that he had a violent temper, used profane and insulting epithets, and that on February 21, 1923, and on many occasions thereafter, defendant falsely accused her of infidelity.

The bill avers that defendant refused to visit complainant's parents or to let them or her relatives visit her; that defendant at one time told complainant to shoot herself; that the sister of defendant lived with them in the home; that this sister domineered and dictated and sought to undermine the love of complainant and defendant; that complainant became nervous and told defendant that he must cease his abuse, and that the sister must get out; and that the defendant told her she must take orders from

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...the brief will acknowledge at various points that the defendant's

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the sister or get a divorce; that she thereupon decided to leave his house and live with her parents, which she did.

In his answer the defendant denies in detail the charges of the bill.

The Chancellor heard the evidence in open court, which as to many material matters consisted of statements made by the complainant and denied by the defendant. Members of the respective families of complainant and defendant also testified as to matters of more or less importance. The record is voluminous, defendant's abstract somewhat meagre; but the necessary facts have been presented by an additional abstract filed by complainant.

The case has hitherto received careful consideration not only because of the importance of the financial matters involved but also on account of serious charges made against the defendant which, while not specifically alleged in the bill, were allowed in evidence without objection on that ground.

The defendant has contended that the decree should be reversed if this court, from a consideration of the whole evidence, is of the opinion that the same is not sustained by the evidence, citing Sharkey v. Sieron, 310 Ill. 98; Bordner v. Kelso, 293 Ill. 175; Smith v. Kopitski, 254 Ill., 498, and many other cases.

As stated in the former opinion, however, we hold that in a case of this sort, where the Chancellor saw the witnesses and heard them testify, the better statement of the rule applicable is that the decree will not be disturbed upon appeal except where it is clearly and manifestly against the weight of the evidence. Johnson v. Johnson, 125 Ill., 510; Porter v. Porter, 162 Ill., 398; Obrock v. Obrock, 32 Ill. App. 149; Smith v. Smith, 226 Ill. App. 157. Applying this rule, we are yet of the opinion that we cannot hold that the decree entered in this case is not sustained by the evidence.

In the first place, the defendant admitted that the complainant was a good woman against whom he had no occasion to make any charge of wrong-doing. She, prior to her marriage, worked for two years in the Department of Justice, where she was accustomed to interrogate prisoners and had to do with the handling of evidence. She afterwards obtained a position with an engraving company, of which defendant was an officer, where she worked for about a year, during which time she began a friendship with defendant which resulted in their marriage.

We think it is apparent from the whole record that the defendant desired to be rid of complainant; in fact, he specifically stated, in the course of the hearing, that he would not take her back, as appears from the following colloquy:

"The Court: Now, just another question - would you take your wife back again?

A. Well, you know when once your love is dead--

The Court: Well, answer the question. Would you take her back now?

A. No."

At a subsequent hearing the defendant modified this statement, saying that he would take complainant back "if she would counteract the things she said about me and come back and live with me and this sister. I would forget everything and take her back. All this lewd stuff I want retracted."

The defendant, of course, had no right to condition his wife's return to him upon an agreement that she live with his sister. The evidence discloses that the defendant is financially able to provide a separate home, and in such case he has no right to compel her to live with his relatives, where the evidence indicates her life would be continually unhappy. The evidence indicates that the sister was crippled by the loss of an arm, and defendant says that he promised their mother on her deathbed that he would properly care for his sister. It is, of course, commendable that he should do so, but not at the expense of the happiness of his wife

and the rupture of his home relations. Smith v. Smith, *supra*; Albee v. Albee, 141 Ill., 550; Marshak v. Marshak, 170 E. W. 567; Field v. Field, 130 N. Y. Supp. 673.

Proof of the fact that defendant used vile and profane epithets with reference to complainant does not rest alone upon her testimony. It is also established by the testimony of an employe and this employe was corroborated by another witness who was called by the defendant. This corroboration, reluctantly given, is persuasive. We have no doubt he falsely accused complainant of unchastity and that he was guilty of the use of violent, obscene and abusive language toward her.

More convincing are a large number of obscene and indecent photographs which complainant testifies defendant kept in the drawer of their dresser in their room, which she says she asked him to destroy, which request he refused. The defendant denies that these pictures were kept in the dresser. He says they were in his trunk, thus admitting possession with his knowledge. He says he obtained ^{them} from two marines, one of whom was a friend of his, but says he has forgotten the names of both. Defendant says he forgot to destroy these photographs, and his counsel argues that the possession of the same has no more tendency to prove defendant's guilt than would the possession of a gun tend to justify a conviction for murder.

The possession of these vile pictures placed a burden on the defendant which his evasive explanations do not meet. As in our former opinion, so now, we refuse to pollute the records of this court by a particular description of these pictures or of the alleged repeated and unnatural acts of the defendant to which complainant testifies, indicating on his part a reprobate and perverted mind, which the possession of these pictures tends to corroborate.

Upon the whole record, this court cannot say that the decree in favor of the complainant is against the clear preponderance of the evidence.

Defendant contends, however, that evidence was admitted in these respects as to matters which were not alleged in the bill, and that the evidence was therefore irrelevant and incompetent. Objection was not, however, made at the trial upon that ground and cannot be successfully urged here for the first time.

It has also been argued that the allowance for alimony and solicitor's fees is excessive. There was evidence from which the court could find that defendant was worth about \$50,000. His income for the year 1923, according to his own statement, was more than \$11,000. We do not think the alimony allowed was excessive.

As to the solicitor's fees, the sum of \$1,000 was allowed, and the testimony as to services shows that the solicitor for complainant spent ten days in court on contested matters besides other necessary services. Prominent members of the Chicago bar testified these services were worth from \$2,000 to \$3,000. The solicitor for defendant suggested that \$500 would be a reasonable amount, and we think the court did not abuse its discretion by fixing the sum at \$1,000.

The foregoing is substantially the opinion as heretofore rendered in this court.

A rehearing was allowed not because the court was of the opinion that the decree on its merits ought not be affirmed, but because of the technical point raised for the first time by defendant in his petition for rehearing, to the effect that it did not appear by the bill or decree that, at the time of the filing of the bill of complaint and prior thereto, the defendant was a resident of Cook county, as required by Par. 23 of Sec. 2,

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It is also noted that the defendant's name is not on the list of persons who were arrested on the date of the incident.

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1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that may be contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that may be contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to address the problem and the resources that will be required to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan of action. Finally, the last step in the process is to evaluate the results of the intervention. This involves determining whether the problem has been resolved and whether the resources have been used effectively.

for additional information please contact the FBI at 1-800-368-5848.

The following is a summary of the information received from the above sources:

THE above is a true and correct copy of the original as the same was presented to the Board of Directors of the City of New York on the 10th day of January, 1900.

1. The first part of the report is a general statement of the purpose of the study and the scope of the work.

Chap. 68, Illinois Rev. Stat. Becklenberg v. Becklenberg, 232 Ill. 120; and Briney v. Briney, 223 Ill. App. 119, are cited to this point.

Becklenberg v. Becklenberg was a proceeding for divorce where the complainant husband obtained a decree against his wife on the grounds of habitual drunkenness, which was affirmed by the Appellate court for this district. The evidence was not preserved by a certificate, and it was urged on error to the Supreme court that the decree did not find by specific recital that the complainant had resided in the state one whole year next before filing his bill; and that it further did not find that the proceedings were had in the county where the complainant resided.

The bill alleged that the complainant was a resident of Cook county where the proceedings were had, and averred that he had been an actual resident of the State of Illinois for more than one year "continuously, immediately preceding the filing of this bill." The answer stated "that it is true that the complainant and the defendant are and have been actual residents of Illinois for more than one year last past," but contained no allegation with reference to residence in the county. This answer was filed three days later than the bill, and, as the Supreme court said, could not be considered an admission that the complainant had been a resident of the state for one whole year next before the filing of the bill.

The decree there found that the court had jurisdiction of the parties and the subject matter, and that all material facts charged in complainant's bill of complaint were true, but this general finding was held insufficient. The court further held (overruling contrary expressions in opinions theretofore rendered) that this question, since it went to the jurisdiction of the subject matter, was one that could not be waived and might be raised

for the first time on appeal or writ of error.

In Briney v. Briney, supra, the defendant husband, in a separate maintenance suit, sought by writ of error to reverse a decree in a suit for separate maintenance. In this case also, there was no bill of exceptions or certificate of evidence. In that case it was pointed out upon appeal that it was not alleged in the bill and the decree did not find that the defendant was a resident of Cook county. This court, upon review held that the fact was jurisdictional and the decree was therefore reversed on the authority of Becklenberg v. Becklenberg, supra.

The separate maintenance statute, Chapter 68, Section 22, provides that "married women who, without their fault, ^{now} live or hereafter may live separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands in the Circuit court of the county where the husband resides, for a reasonable support and maintenance.

***"

In this case, unlike the cases cited, the evidence has been preserved by certificate, and, while it is true that the bill does not allege specifically that the defendant husband is a resident of Cook county, in which suit was filed, that fact was made to appear from the evidence.

It is a familiar rule that, while this court will not look at the record in order to reverse, it will do so in order to affirm. An examination of the record shows that complainant's bill was filed against defendant on May 22, 1923, and that defendant was served with summons by the sheriff of Cook county, Illinois, on May 24, 1923, and filed his answer to the bill in the Superior court of Cook county on June 1, 1923.

It also appears from the evidence that the complainant

WILSON TO FIVE IN THREE. 24 MARCH 1973 WFO 68T

10. The following information is for your information only:

« Je ne suis pas un homme de bien », dit-il, « mais je suis un homme de cœur. »

Source: U.S. Census Bureau, *Statistical Abstract of the United States*, 1997, Table 1201.

SECRET

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As of 1994, the number of people in the United States who are over 65 is 35 million, and this number is projected to increase to 45 million by the year 2010. The number of people over 65 is expected to increase from 12% of the population in 1994 to 18% in 2010. The number of people over 65 is expected to increase from 12% of the population in 1994 to 18% in 2010. The number of people over 65 is expected to increase from 12% of the population in 1994 to 18% in 2010.

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For the purpose of this study, each case was coded as follows:

There is also a small section of the river which is not navigable, but which is used for the purpose of irrigation.

2274 Wilson Avenue, Suite 200, Westborough, MA 01581, USA

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1. The first step is to identify the problem or question that needs to be answered.

was married to the defendant at Chicago, Illinois, on June 1, 1922, and lived with him until May 16, 1923; that soon after their marriage defendant took the complainant to live at his home, in which his sister also resided; and that the defendant resides at 3840 North Decoy avenue, Chicago, Illinois, in a home occupied by him and his sister. It also appears from the evidence that the defendant is engaged in business at Chicago, and that in February, 1924, defendant filed an income tax schedule with the Internal Revenue Department of the United States Government, at Chicago, Illinois, and alleging that his residence is in Chicago. The court will take judicial notice of the fact that Chicago is situated in Cook county, Illinois. See Harding v. Strong, 42 Ill. 148; People v. Sunniger, 103 Ill. 434; Sullivan v. People, 122 Ill. 385.

It follows that the trial court had jurisdiction of the subject matter, and that the decree must be affirmed.

AFFIRMED.

McBurely, P. J., and Johnston, J., concur.

was married to the defendant at Chicago, Illinois, on June 1, 1920,
and lived with him until July 15, 1920, when they were
separated from the defendant by him at his home, in which
his sister also resided; and that the defendant visited at said
house during summer, Chicago, Illinois, in a room occupied by
him and his sister. It also appears from the evidence that the
defendant is engaged in business at Chicago, and that in January,
1921, defendant lived at home, his family and the defendant
receiving payment of the United States Government, at Chicago,
Illinois, and although said his residence was at Chicago. The
evidence will also establish further that the defendant is engaged
in said business, Illinois. See Exhibit A marked as 111, 112,
113 and 114, and Exhibit B marked as 115, 116, 117, 118,
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It follows that the facts herein set forth are true
and correct, and that the facts herein set forth are true
and correct.

Respectfully,
W. L. and J. L. Jones.

Very truly yours,
W. L. and J. L. Jones.

4579a

ROBERT C. DWENY

Appellee,

vs.

W. B. MUNDIE and E. C. JENSEN,
Appellants.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

238 I.A. 622⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause is now before us upon rehearing granted upon the petition of defendants. Our former opinion was as follows:

"Complainant filed a bill in which he alleged in substance that on April 1, 1905, he with defendants, Mundie and Jensen, entered into a copartnership agreement for the practice of the profession of architects and engineers; that said copartnership was carried on until the first day of October, 1908, at which time complainant withdrew and the copartnership was dissolved.

"The bill further alleged that an accounting of the partnership affairs had not been made and prayed for such accounting.

"The answer denied the formation or existence of the partnership and denied all other material averments of the bill. The cause was referred to a Master who reported that there was a copartnership agreement and stated the account. Objections to this report were filed by the defendants, which were overruled by the Master and the cause heard by the Chancellor upon these objections filed as exceptions.

"The exceptions were overruled, the report of the Master confirmed, a decree entered in conformity therewith, finding that there was due to complainant from defendants the total sum of \$8117.35. Judgment was entered in favor of the complainant for that amount and for costs.

"In view of the amount involved, the intricacy of the questions which arise and the sharp conflict in the evidence, we regret the inadequate way in which the merits of this appeal are presented in the abstract and brief.

"The exceptions are for the most part general in nature and the Chancellor may have well refused to consider most of them for the reasons set forth in Huling v. Farwell, 33 Ill. App. 238, where, confronted by a somewhat similar situation, the court stated that it refused to embark upon a voyage of discovery without chart or compass. Cases were there cited showing the proper practice, and it is unnecessary to repeat.

"There are two controlling questions in the case. First, whether a copartnership in fact existed as alleged in the bill of complaint, and, second, whether the account as stated is correct. The first of these questions is a mixed question of law and fact, and the other a question of fact.

"That, in the first instance, the burden of proof was upon the complainant to establish the existence of the copartnership must be conceded. On that question there is a sharp conflict in the evidence.

"For some years prior to the first day of April, 1905, the defendant, W. B. Mundie, was in partnership with one W. L. B. Jenney, and they together practiced their profession in the city of Chicago. The defendant Jensen was for many months prior to that time an employe of this firm, acting as its general superintendent. The firm name was Jenney and Mundie.

"The complainant, Dwen, also an architect, for four years prior to that time was an employe of Jenney and Mundie, and his duties were drafting and supervising, for which he received a salary of \$40 a week.

"About April 1, 1905, Mr. Mundie bought out the interest of Mr. Jenney in the firm and a new copartnership was organized, which proceeded to do business under the firm name of Jenney, Mundie and Jensen. Mr. Jenney, however, had no interest in the new firm. The complainant contends that he became a member of the firm at the same time as Mr. Jensen, and by reason of an agreement made between himself and Mr. Mundie just prior to that time. The alleged agreement is not evidenced by any writing and the fact of its existence or non-existence seems to depend largely upon the testimony of the complainant as to oral conversations.

"The complainant says that a short time prior to April 1, 1905, he had a disagreement with Mr. Jensen as a result of which he communicated to Mr. Mundie his intention to resign, whereupon Mr. Mundie asked him not to do so; said that he, Mundie, would go to California where he would see Mr. Jenney, and see if arrangements could not be made by which he, Mundie, might control the firm; and that, if he did so, he would form a partnership consisting of himself, Mr. Jensen and the complainant.

"Mr. Mundie made the trip to California and succeeded in making the arrangements with Mr. Jenney, and complainant says:

"When Mr. Mundie returned he said he had made arrangements with Mr. Jenney and showed me a copy of the document. Mr. Mundie stated he would form a partnership in which Mr. Jensen was to have thirty per cent, Mr. Mundie was to have sixty per cent, and I was to have ten per cent, with a certain amount per week in addition -- \$40 per week, and I said to Mr. Mundie, 'All right, that is satisfactory to me.' Mr. Mundie said, 'That is all right, Bob, we will arrange that.'"

"The complainant also states: 'I do not recall any conversation with Mr. Jensen. I did not have a talk with Mr. Jensen. The sole conversation was with Mr. Mundie and myself.'

"On the contrary Mr. Mundie testifies: 'I had no conversation with Mr. Dwen in which I proposed to give him an interest in the firm or I would make him a partner. I told Mr. Dwen that I would pay \$40 a week and ten per cent as a bonus or commission on all moneys that came in after deducting the running expenses the same as Mr. Jensen had received. He said all right, and we went upstairs.'

"Mr. Mundie also says: 'I told him also that he would have nothing whatever to do with the assets or liabilities of the firm whatever, and that the library was mine. *** I told Mr. Dwen that Jensen was to be my partner and that he was to come in and take Jensen's place.'

"Mr. Jensen also testifies to the effect that he, Jensen, was the only partner, and the Master finds that the complainant did not consult with or enter into a new agreement of any kind

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It is a fact that the Government of the United States has been in the habit of paying the salaries of its officials in advance of the time when they are due. This practice has been continued for many years and it is not likely that it will be discontinued in the near future. The Government has always been in the habit of paying the salaries of its officials in advance of the time when they are due. This practice has been continued for many years and it is not likely that it will be discontinued in the near future.

The above information was obtained from a review of the files of the Federal Bureau of Investigation, Department of Justice, Washington, D.C., and the files of the New York City Office of the Federal Bureau of Investigation, Department of Justice.

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with the defendant, Jensen, but the agreement was made with Mundie alone.

"If the existence of the partnership depended alone upon the testimony of the witnesses as to the oral conversations between the parties, we would doubt very much whether the evidence was sufficient to sustain the finding of the decree. There was, however, other evidence as to the manner in which the business was conducted tending to sustain the contention of the complainant.

"It is uncontradicted that about April 1, 1905, the name of complainant Dwen was put upon the door of the office, and it also appears that the business cards thereafter used were as follows:

"W. B. Mundie
E. C. Jensen
E. C. Dwen

Telephones
Central 1742
Automatic 2701

JENNEY, MUNDIE & JENSEN
Architects
New York Life Building
Chicago.'

"It also appears that during the same time the letterheads used by the firm were as follows:

"JENNEY, MUNDIE & JENSEN
Architects
1401 New York Life Building
171 LaSalle Street
Chicago.

Tel. { Central 1742
Automatic 2701.

W. B. Mundie
E. C. Jensen
E. C. Dwen.'

"It also appears that in the architects' certificates thereafter used by the firm, the name of complainant appeared in a similar manner.

"It further appears that upon the business cards and letterheads which had been used prior to this time by the firm of Jenney and Mundie, the name of Mr. Jensen appeared in the same position as that in which Mr. Dwen's thereafter appeared, but that Mr. Dwen's name did not appear thereon.

"However, the name of the complainant did not appear upon the seal which was used by the firm; and the Master finds that complainant did not, during the time of the existence of this alleged partnership, sign checks or vouchers for the firm; and that with the exception of two instances he did not sign building certificates nor was he consulted by Mr. Mundie and Mr. Jensen concerning the taking on of work or the price which was to be charged therefor, with the exception of two jobs which were brought in by complainant himself.

"It also appears that the complainant filed in the office of the firm each day a report of the time which he had spent on different jobs, and that such time was charged as part of the expense, as was the practice with employes of the firm during that period, except the bookkeeper, stenographer and office boys. It also appears that neither Mr. Mundie nor Mr. Jensen

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From the 1991-2 Hong Kong trade fair, the Government of Hong Kong has been able to secure a number of new orders for the sale of its goods and services. The Government has also been able to secure a number of new orders for the sale of its goods and services.

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put in any such reports.

"With reference to two architects' certificates which were signed by Mr. Owen, Mundie testified (and if his evidence is contradicted in the record the same has not been called to our attention) 'Mr. Owen did sign some architect's certificates, and I warned him twice that he must not do it, that he was not a member of the firm.'

"It is difficult to collect from the text books or the cases an adequate definition of a partnership. The best known definitions will be found in the introduction to Lindley on Partnership, vol. 1, pp. 3 to 4.

"Substantially, however, we think, under the decisions of the courts of this state, a partnership may be defined as the relation or status created by the agreement of competent persons who as principals contract that a business or profession shall be conducted by one or more of these persons in behalf of all of them with a view to sharing profits.

"The evidence shows in this case persons competent to contract and that the profits should be shared among these three. If there is any essential of a partnership lacking, the same has not been pointed out in the argument or brief of the defendants. They cite Phillips v. Phillips, 49 Ill. 437, and Smith v. Knight, 71 Ill. 148, to the point that the burden of proving the existence of a partnership is upon the party alleging it, but the difficulty of the case is not lessened by conceding that point. Cases are also cited as to the competency of defendants as witnesses to deny a partnership or to explain circumstances indicating that a particular defendant is a member of a partnership firm, and also cases to the point that material allegations of a bill not admitted or denied must be supported by proof.

"These cases give no aid to the court in the determination of the issue here in controversy which, as already stated, is whether a partnership did or did not exist. It is for the defendants to present by their exceptions the evidence from which it may be made to appear that the decree entered was erroneous. It is not for this court to search the record in order to discover reasons to reverse.

"The complainant has properly pointed out that the existence or non-existence of a partnership is primarily a question of the intention of the parties to be determined from all the facts and circumstances. They insist that the sharing of profits is presumptive evidence of a partnership, and cite Niehoff v. Dudley, 40 Ill. 406; Leads v. Townsend, 80 Ill. App. 646; Irvin v. N. C. & St. L. Ry. Co., 92 Ill. 103; Lockwood v. Deane, 107 Ill. 235; and Farish v. Bainum, 306 Ill. 618, with other cases which so hold. They also argue that the books of account which were kept by defendants themselves are conclusive against them and cite the evidence by reason of which, it is claimed, the principle is applicable here. They also point out that the consent of Mr. Jensen in the first instance was not necessary, provided he thereafter acquiesced in the arrangement, and they cite the evidence in the record and the decisions of the court to this point.

"They further contend that, irrespective of the question of the partnership relation, the decree should be sustained upon the theory that, where the state of the accounts between the parties is complicated and intricate, and when to do justice requires the employment of methods of investigation peculiar to courts of equity in a situation where it would be difficult or impossible for a jury to give proper consideration to numerous transactions, a court of equity will take jurisdiction, not upon the theory that

there is no remedy at law, but that the remedy at law is inadequate. Crown Coal & Tow Co. v. Thomas, 177 Ill. 534; Channon v. Stewart, 103 Ill., 541; and Mayr v. Nelson Chasman & Co., 195 Ill. App. 587, are cited to this point.

"The defendants have not seen fit to avail themselves of the opportunity afforded under the rules of practice of this court by filing a reply brief in which this court might be informed as to their views upon the points thus presented.

"A careful reading of the Master's report and of the decree entered gives us the impression that the question as to whether a partnership in fact existed is an exceedingly close one, but it is not the duty of the court to make the search of the record from which that question can be determined; nor would it be fair to the other litigant for the court to do so. On the contrary it is the duty of the party who appeals to point out clearly and distinctly the matters, if any, which render a reversal mandatory. This has not been done, and with doubt we affirm the decree."

After a consideration of the petition for rehearing and the reply of the plaintiff thereto, we are disposed to adhere to the original decision. While we are disposed upon further reflection to hold that plaintiff and defendants were not copartners because complainant was not a principal, we are also of the opinion that complainant was on the facts entitled to the relief granted by the decree.

The statement that there are two controlling questions is inaccurate. There is, in fact, only one, and that whether the statement of account between these parties is correct. The account appears to have been accurately taken. There is no evidence to the contrary except that of the witness, McGregor, who testified that one item was incorrect, but merely as his conclusion.

The decree is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

45862

ARTHUR A. KING,
Appellee.

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

238 I.A. 623

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$14,000, entered in favor of the plaintiff upon the verdict of a jury for that amount, after a motion by defendant for a new trial had been overruled. After the evidence had been taken the plaintiff filed an amended declaration in two counts.

The first count alleged that on April 2, 1923, defendant was operating a steam railroad between various states of the United States; that plaintiff was employed by the defendant as a switchman, or brakeman, and was engaged in the movement of a freight train from Chicago, Illinois, to Battle Creek, Michigan, and in the operation thereof was engaged in interstate commerce; that, by reason of the Federal Employers' Liability Act, it was the duty of the defendant to exercise ordinary care to keep and maintain its appliances, road bed, freight cars, couplers, etc., in a reasonable safe condition for the safety of the plaintiff. That defendant failed in its duty in that respect, in that, in violation of the Act, it furnished certain cars, couplers, draw bars, pins, locks, knuckles and appliances connected therewith which were defective, loose, broken, worn and otherwise insufficient, of not the proper size, length, etc. That the defendant negligently and carelessly failed to properly

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This is an appeal by the defendant from a judgment

in the sum of \$10,000, entered in favor of the plaintiff and

the verdict of a jury for that amount, after a hearing by

the court for a new trial had been granted. The case

arose out of a contract for the sale of certain

land in the county of...

The first issue raised is whether the...

and was operating a steam engine in the...

the engine was damaged by the...

as a result, the engine, and was damaged by the...

a train from Chicago, Illinois, to...

and in the operation thereof was damaged by the...

that, by reason of the engine being damaged, it was

the only one left in the county...

and in the operation thereof was damaged by the...

it is contended that the engine was damaged by the...

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and in the operation thereof was damaged by the...

that the engine was damaged by the...

couple certain freight cars in said train; that these defects were known to the defendant or should have been known to it; and, while plaintiff, in the exercise of due care, was riding in the caboose of the train at or near Sedley, in the State of Indiana, by reason of the negligence described, certain cars in the train broke in two at the coupling, and thereafter the two portions of the train collided with each other, throwing the plaintiff with great force and violence against the stove and other parts of the caboose, causing him great pain and permanent injury.

The second count averred that, on the same date, the defendant was operating a train and plaintiff was in its employ, in the movement of it, engaged in interstate commerce, and defendant was subject to the Federal Employers' Liability Act which required defendant to provide its cars with automatic couplers to maintain drawbars of the standard height, and to maintain them so that they were not defective or insecure. That defendant negligently failed so to do; and that, by reason thereof, certain cars of the train broke in two and the broken portions thereafter collided with great force and violence, injuring plaintiff.

On the filing of this amended declaration, the defendant moved for a continuance and presented and filed an affidavit in support of its motion.

This affidavit was to the effect that the defendant could not safely go to trial under the amended declaration, because of the absence of material witnesses who were named and by whom it was averred that defendant would be able to disprove allegations in the amended declaration as to the construction and condition of defendant's tracks at the place where the accident occurred. The motion was denied and the defendant ruled to answer the amended declaration instantler. The defendant urges that the denial of this motion was error. It was the design of the plaintiff, in filing the

amended declaration, to make the same conform to the evidence which had already been taken, and no further evidence was offered by the plaintiff after this declaration was filed.

Section 42 of the Practice Act (Smith-Burd Ill. Revised Statutes, 1923, Chapter 110) provides that no amendment shall be cause for continuance unless the party affected thereby or his agent or attorney makes affidavit, that, in consequence thereof, he is unprepared to proceed with the trial of the cause at that term. The affidavit of the defendant does not so allege. Notwithstanding anything averred in the affidavit, it may have been true that the defendant could have produced the witnesses named within a reasonable time and during the term. It does not appear any request was made to that end, and, as the affidavit must be construed most strongly against the pleader, we are unable to hold that the court abused its discretion.

It is next urged in behalf of defendant that the court erred in its rulings on the admission of evidence, in that it permitted plaintiff who testified in his own behalf to state as his conclusion, based on other facts in evidence, that just prior to the accident the train parted. This it is urged amounted to an invasion of the province of the jury. The theory of the plaintiff's case was that there was some defect in the coupler of two cars in the train on account of which, just prior to the accident, the train was parted. The plaintiff testified that the accident happened about 3:30 or 4:00 o'clock in the afternoon of a pleasant day on April 2, 1923, near Sedley, Indiana. He said the first unusual thing he heard was the air set on the caboose, the brakes starting to hold or grip, and that he started to get out of his chair; that he heard the air set and the caboose stopped a little and went ahead again.

He was then asked: "Q. What did that indicate to you

as a railroad man with reference to the movement of the train?
(Objection by defendant on the ground it is a mere guess.)

Mr. Bloomington: No. I am going to show it is positive knowledge on his part. He can always tell, any railroad man can tell. The Court: You can ask him if he knows. Mr. Bloomington: That

is the substance. (Question read.) A That the train had broken in two, had parted." The defendant thereupon ^{moved} to strike this answer out, and the court stated that he thought plaintiff should first find out whether the witness knew what his experience was. Plaintiff said he had many experiences as to when trains had broken in two and could tell from his knowledge of the action of trains when a train had broken in two. He was then asked what the fact was as to whether or not this train had broken in two, and to that question the defendant objected. The court ruled: "If he knows he may tell. He has shown by his experience. He said he had experience." To this ruling, the defendant excepted, whereupon defendant answered: "You can always tell by the air, swishing of the air, that the brakes had been set. The brakes were grinding on the wheel and it will stop suddenly, and if there is nothing to hold it, the cars will go on again, and that is what happened at that time."

There can be no doubt of the materiality of this evidence. The theory of the plaintiff was that the train parted on account of defects in the coupler, and, if the train in fact parted, there would be an inference of defendant's negligence from the mere fact of the opening of the couplers. It has been so held in two cases upon which plaintiff relies, in which, however, there was no dispute about the fact that the train had broken apart. (See P. & R. R. Co. v. Eisenhart, 280 Fed. Rep. 271; and R. R. Co. v. Gatschall, 244 U. S. 66.)

In the latter case, the Supreme Court of the United States said that, in view of the positive duty imposed by the

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Statute upon the railroad to furnish safe appliances for the coupling of cars, the jury might properly infer negligence on the part of the company from the fact that the coupler failed to perform its function, although there was no other proof of negligence.

There is no conflict in the evidence that the air went on in emergency at about the time when it is claimed the accident occurred, but the evidence is also to the effect that this might have been brought about from other causes than the parting of the cars. Indeed, plaintiff himself testifies that the air may go on from other causes. He says that, after being thrown against the stove in the caboose and to the floor, he went to the end of the front car from the caboose and found the airhose parted and coupled it up, and then came out and gave the conductor a signal to go ahead; and that after the air had been pumped the train moved.

He did not find the cars uncoupled, and his testimony to the effect that the trains parted is manifestly his own guess or conclusion, based on other facts which he, in his evidence, relates to the jury, and of which the jury, not he, should have been allowed to judge. As was said by our Supreme Court in I.C. R. R. Co. v. Smith, 208 Ill. 613, "the opinion of witnesses should not be asked in such a way as to cover the very question to be found by court or jury." Here, if the plaintiff had been asked simply for his opinion as an expert, a different question would have been presented, which it is, however, unnecessary for us to decide on this record.

It is true, as the plaintiff suggests, that the ultimate question in the case was not whether the train broke apart, but whether the train broke apart through the negligence of the defendant; but, on the other hand, under the Statute as construed by the United States Supreme Court, if it were once proved to be

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the fact that the train broke apart, the negligence of the defendant was inferred therefrom. As this error is so serious as to require reversal, it will be unnecessary to discuss other alleged errors.

For the reasons indicated, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, F. J., and Johnston, J., concur.

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Energy is the key to the future.

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BERNARD L. STERN et al.,
(Complainants,
Appellees,

vs.

SISSON COMPANY et al.,
(Defendants,
SISSON COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

238 I.A. 623²

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order appointing a receiver in a proceeding to foreclose a second mortgage. The mortgaged premises are certain real estate and the twelve story brick building thereon, operated as a hotel by the Sisson Company, hereinafter called defendant, and known as the Sisson Hotel.

Points are presented which might be material in the principal case, but on the instant appeal it is necessary to note only two: (1) The provisions of the mortgage touching defaults of the mortgagor; and (2) The relation between the indebtedness of the defendant and the value of the security.

The present trust deed or mortgage is to secure a \$50,000 note, executed by defendant subject to a prior trust deed to secure \$1,250,000. It is provided that a breach of this prior mortgage shall operate as a breach of the second mortgage. The second mortgage conveyed the real estate

"together with all and singular the tenements, hereditaments and appurtenances therunto belonging, and the rents, issues and profits thereof, and all gas fixtures, engines, boilers, ranges, heating apparatus, furnaces, ice boxes, shades, book cases, and all personal property of every character belonging to said grantor, then or thereafter on said premises, and furnished for or intended for use by tenants, and all fixtures in or that should be placed in any building then or thereafter standing on said land."

Also the defendant company released and waived

"all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements."

Also that in case of default or any other breach the whole indebtedness should become due and

"upon any such breach the grantor waives all right to the possession of and income and rents of said premises, and it shall be lawful for said grantee, and he is hereby authorized and empowered, to enter into and take possession of the premises hereby conveyed and to let the same and collect and receive all rents, issues and profits thereof."

And thereupon the legal holders of the note and trust deed

"should have the right immediately to foreclose this trust deed, in the manner provided by law; and upon the filing of any bill for that purpose the court in which such bill is filed shall at once and without notice to the said party of the first part or any party claiming under said first party, appoint a receiver for the benefit of the legal holder or holders of the indebtedness secured hereby, to take possession of, manage and control said premises, with power to collect the rents, issues and profits of said premises during the pendency of such foreclosure suit and until the time to redeem the same from any decree foreclosing this trust deed shall expire and in case there shall be no redemption from any such decree then, until said premises shall be sold in pursuance of any such decree and a master's deed thereof shall have been executed and recorded."

Also that

"The Grantor waives and releases to said Grantee all right to the possession of and income from said premises pending such foreclosure proceedings and until the period of redemption from any decree foreclosing this trust deed shall expire."

The bill alleges default in payment of interest due from June 11, 1924, also that a mechanic's lien on the premises has ripened into a decree. Upon the application for a receiver it was shown that there was \$1,030,000 of bonds of the first mortgage outstanding; that by the first mortgage it was provided that the defendant should deposit with a named depository on the first day of each month one-twelfth of the annual interest payable on the outstanding bonds and one-twelfth of the principal amount of such bonds as matured on February 1st, in each year, and that these

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deposits to be made July, August, September, October, November and December, 1924, have not been made; that the mortgage also provided that the defendant should deposit on July 1st 1924, \$1,236 on account of the Federal income tax, but this deposit has not been made; that the defendant company has also defaulted in failing to pay certain special assessments levied against the premises and also in failing to pay certain bills for premium on fire insurance policies provided for by the mortgage; that there is also due the Snyder Company over \$20,000 on a mechanic's lien decree obtained by said company, which constitutes another default.

In addition to these items of indebtedness of the defendant, the record shows that November 26, 1924, S. W. Straus & Company obtained a judgment for \$417,420.60 against defendant in an action to recover for moneys advanced; that defendant had suffered an impairment in its capital of about \$340,000; that the defendant company had never paid any dividend on any of its stock; that it owed for current debts and wages to its employees about \$50,000 and many of said claims were long past due; that the defendant company was unable to procure cash or credit to pay its current debts as they fell due, and many creditors were threatening to sue it for the amounts due; that most of the rooms in the hotel were vacant and that the business is constantly diminishing and losses increasing, and that by reason thereof the defendant company could not procure sufficient working capital or credit to maintain said hotel properly or to operate it successfully. At the time of the application for a receiver the defendant company was in default under the first mortgage and also under the second mortgage over \$82,000 on account of the deposits above referred to and income tax, special assessments, insurance premiums and mechanic's lien. The aggregate of all liens on the mortgaged premises is in excess of \$1,580,000. Defendant admits an indebted-

deposited to be made July, August, September, October, November and
December, 1914, and the first payment was made on January 1, 1915.
That the defendant should deposit on July 1, 1914, \$1,000 as an
amount of the Federal Income Tax, and this amount can not be
made; that the defendant's company has also defaulted in making
to pay certain weekly assessments for the payment of the principal
and also in failing to pay certain bills for expenses of this in-
terprise collected against the defendant's company, and hence in the
case the Federal Income Tax, and the defendant's company
obtained by said company, which assessments were not paid.
In addition to these items of indebtedness of the de-
fendant, the record shows that December 22, 1914, O. T. Brown
a company obtained a judgment for \$25,000.00 against defendant
in an action to recover the money borrowed from defendant
and interest on the same. In the finding of the court, it was
determined that defendant's company had spent and was obligated to pay of the money
that it had for certain bills and money in the defendant's hands
\$25,000 and more of said money was then paid to the defendant
for the company and interest on the same was paid to the
defendant until in May 1915, and the defendant's company
has to pay to the defendant that sum of \$25,000 in the
total were amount and that the business is financially embarrassed
and losses sustained, and that by reason thereof its business
cannot exist and business affairs are being carried on daily to
maintain said hotel property as to operate in consequence. At
the time of the application for a receiver the defendant's company
was in default under the first mortgage and was under the second
mortgage from the defendant of the defendant's company and was
and hence was, several thousands of dollars behind the

ness of about \$1,750,000.

Competent and experienced real estate men in affidavits stated that the value of the property does not exceed \$1,500,000, and that it would not bring this much at a forced sale. Defendant's opposing affidavit places the value at \$3,000,000; considering the comparative experience in handling real estate in this vicinity of the parties making affidavits, the Chancellor was justified in being influenced by the opinion of those who placed the smaller value on the property.

The mere recital of the above facts and conditions is sufficient for our conclusion that the Chancellor, in appointing the receiver, acted properly and for the best interests of all parties concerned. Althausen v. Egan, 222 Ill. App. 324; Bagley v. Illinois Trust and Savings Bank, 109 Ill. 76; Halton v. Starr, 223 Ill. App. 39, and many other cases approving of a receivership under similar circumstances.

It is suggested that the court should not have directed the receiver to operate the property as a hotel. The building was constructed for hotel purposes and to terminate the business and allow the building to remain vacant would greatly injure and lessen its value. A receiver is appointed to preserve the property for the benefit of all parties interested, and if this is attained by continuing the business, the court has the power so to order. Knickerbocker v. McKindley Coal Co., 172 Ill., 535. There is abundant precedent for holding that the court will authorize a receiver to carry on the business where the mortgaged property is of such a nature that the discontinuance of the business would destroy or greatly impair the value of the property. 27 Cyc. 1631. Tardy's Smith on Receivership, (1920) vol. 1, page 957.

The record also shows that upon the hearing before the Chancellor counsel for defendant conceded that it was desirable

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1997, vol. 15, number 1, pp. 1-10. Printed in the United Kingdom

1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 23

The second view shows that even the best of us

that the receiver should continue to operate the building as a hotel, one of such counsel saying that in his opinion "it would be a calamity to close that hotel."

There is no merit in the suggestion that the mortgage does not cover the equipment of the roof garden and the furniture and fixtures in the kitchen, bakery, dining-room, restaurant, and public rooms. It covers

"all personal property of every character belonging to said grantor, then or thereafter on said premises, and furnished for or intended for use by tenants, and all fixtures in or that should be placed in any building then or thereafter standing on said land."

The court appointed Lawrence E. Greensbaum receiver and this appointment is criticised on the ground that he is an employe of the complainants. The record does not show that he is an employe of the particular complainant in this proceeding, although employed by S. W. Straus & Company. No objection was made to this appointment on the ground of his relations to any of the interested parties, and Mr. Greensbaum seems to be fully competent to manage the hotel, as shown by his experience in the operation and management of a number of high grade hotels. An appointment of an interested party is not necessarily improper where other circumstances show that the best interests of the estate will be served by such appointment. Patterson v. Northern Trust Co., 230 Ill. 334.

Other points suggested are not material at present. Upon the instant record the appointment of a receiver was not only justified, but would seem to be so desirable in the interests of defendant company, as well as of the complainants, that any serious objection would hardly have been expected.

The order of the Chancellor is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

45 82a

ATLANTIC COAST DISTRIBUTORS,
(a corporation),
Appellee,

vs.

WARREN RAILWAY COMPANY,
(a corporation),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

238 I.A. 623³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against the defendant for \$109.60 in a suit claiming damage by freezing to an interstate shipment of apples from Chicago to New York city.

The statement of claim alleged ownership of the bill of lading in plaintiff (who was not the shipper), the good condition of the apples when delivered for shipment, and the damaged condition when tendered for delivery.

While plaintiff made no proof as to the ownership of the bill of lading, relying on the failure of the affidavit of merits to take direct issue thereon, it undertook to prove the other two elements of the action. Its proof showed the good condition of the apples when delivered for shipment, but failed to show their condition "when tendered for delivery."

It was agreed that the car containing the apples arrived at the destination for delivery February 15, 1922, that the consignee was notified thereof the same day, and that it was delivered on February 20th, five days later. There was no attempt to prove the condition of the apples at the time of their arrival or until February 20th, when delivered. The only proof on that subject was the deposition of one Uhlmann,

who testified that on the latter date he examined the apples and "found 152 boxes more or less frozen." His evidence, which is somewhat indefinite, tends to show that the 152 boxes were those which he saw displayed for sale on the railroad pier, and the rest of the shipment was at that time in the car uninjured, but "a trifle ripe." The damage claimed is for the 152 boxes. There was no proof who placed the boxes on the pier, how long they remained there, or the state of the weather during that time, or when they were unloaded, and no proof to support an inference that they were frozen before that day.

Plaintiff relied upon a prima facie case. The court having denied defendant's motion for judgment, defendant offered in evidence, and the court received over plaintiff's objection, the bill of lading and a schedule of tariff rates as the same appeared in a printed document purporting to have been issued under authority of the Director General of Railroads to show that protective service against cold or freezing was not applicable to such shipment.

The bill of lading, which in the absence of any contention or showing to the contrary must be taken as fixing the rights and liabilities of the parties, provides that "property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been sent or given, may be kept in car, depot or place of delivery of the carrier, or warehouse, subject *** to carrier's responsibility as warehouseman only."

In view of this provision and the proof showing condition of the property, not at the time of delivery as alleged, but only at a time five days after delivery, when, according to the bill of lading, defendant's liability was limited to that of a warehouseman, we think the proof was insufficient to sustain the statement

was testified that on the 10th day of January, 1900, the witness
"about 100 boxes were at home." The witness, who is
interested in the case, knows on what day the boxes were
taken which he saw delivered to him by the witness, and
the rest of the shipment was at that time in the car
box "a little later." The witness claimed in for the 100 boxes.

There was no proof was shown the boxes on the 10th,
the 10th day, because the witness, on the 10th of the witness
telling him that, at that time, it was not delivered, and the 10th is
concerned on the witness that they were taken before that day.

Witness testified that a large number of boxes
being taken delivered to him for delivery, and the witness
in evidence, and the court received from the witness's statement
the bill of lading and a schedule of goods under the same
contained in a related document purporting to have been issued
under authority of the Western Union of California in New
York. The witness testified that he was taking the boxes
delivered to him and shipped.

The bill of lading, which is the receipt of the
receipt of goods in the country and is taken as it is the
evidence and liability of the parties, witnesses that "property
and delivery of the goods delivered as evidence is within the
evidence (evidence of the bill of lading) after notice of the
goods has been sent to them, and he was in the, and he
place of delivery of the goods, or warehouse, except the
to receive the responsibility as evidenced by the bill."

In view of this provision and the fact that the witness
of the property, and as the bill of delivery is signed, but only
at a time five days after delivery, when, according to the bill of
lading, delivery is made, it is clear that the bill of lading
and, in view of the fact that the bill of lading is made by the

of claim, or a cause of action against defendant as carrier. Nor would such proof be sufficient to show liability as a warehouseman, assuming recovery against defendant as such could be had under the statement of claim. For aught that appears to the contrary the apples may have been frozen while left on the pier by the consignee after delivery. The affirmative of the issue was on plaintiff and it failed to sustain it. While the writer thinks this court should find the facts on such a record, the majority of the court favor a reversal and remandment for the introduction of other evidence as to when the injury to the apples occurred, if it can be shown, it appearing that they were frozen.

In view of remandment points are made that may come up for consideration on another trial.

Defendant moved to suppress the deposition referred to, claiming that the dedimus potestatem did not properly designate the person named "as commissioner." It is addressed to a designated party, who took the deposition, and states, "we * * * have appointed you commissioner to examine the said witness," etc. We regard the point as frivolous.

It is further urged as ground for suppression that the deposition, which was to be taken on oral interrogatories, states on its face that the direct examination was by the Commissioner "on behalf of the plaintiff." It does not appear that plaintiff's attorneys were present, but it appears in the return made by the Commissioner that attorneys appeared specially for defendant and objected to such examination by the Commissioner. This court in Foster Drug Co. v. Zeller & Sons Co., (the opinion being merely abstracted), 191 Ill. App. 598, construed Sec. 30 of the Evidence Act as authorizing such an examination.

In view of the reversal and remandment defendant's other points with respect to a denial of its motions for continuance and of time for submission of propositions of law need not be considered. Nor is plaintiff's objection to the proof of tariff properly before us in the absence of cross errors.

REVERSED AND REMANDED.

Gridley and Nitch, JJ., concur.

the view of the respondents and respondents' comments.

Other points of the survey in a total of 100 responses are
mentioned in the table. The respondents' comments are also
mentioned in the table. The respondents' comments are also
mentioned in the table. The respondents' comments are also
mentioned in the table.

Comments on the survey.

Comments on the survey.

Comments on the survey.

Comments on the survey.

WILLIAM C. MOULTON,
Appellee.

vs.

FLORENTINE ART METAL WORKS and
EDWARD C. RUTTENBERG,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

238 I.A. 623⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit in equity in the nature of a creditor's bill, based on section 53 of the Corporation Act, brought by appellee against appellants and two other co-defendants.

The bill alleges that complainant entered into a contract with the Florentine Art Metal Works, a corporation, to deliver and erect wrought iron doors, transoms, grills and railings as per architect's plans at the price of \$685; that said corporation failed and refused to comply with the contract, whereupon complainant was compelled to have the work done by another party and to pay therefor \$914.57 in excess of said contract price; that appellant Ruttenberg conspired with Louis L. Ruttenberg and one Feldman (who were made co-defendants but later were dismissed out of the case) to wreck said corporation, divide its assets and hinder complainant from enforcing his contract and collecting his just demands; that Louis L. Ruttenberg acquired all the shares of its capital stock and complete control of it, and that the two Ruttenbergs, doing business as the Art Lamp Manufacturing Co., took possession of the assets of said corporation, which thereafter ceased doing business, having no property subject to execution.

The corporation's answer denied entering into the contract or conspiracy and every material allegation, and averred

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This is a bill in equity to the extent of a writ-
ter's bill, based on Section 22 of the Constitution and, through
its provisions against appointment and two other provisions.
The bill alleges that appointment was made into a
contract with the Government and that there, a corporation, to
deliver and receive through from above, Tennessee, North and this
bill as per statute's terms in the year 1901, that bill
provision failed and there is nothing left in the contract,
whereas complaint was received in that the year 1901
another party had to pay through 1911. It is stated in this year
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there were eliminated out of the group, by which complaint
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that it had no creditors except appellant Rittenberg. The latter's answer denied the conspiracy, and set up facts to the effect that he and others were creditors of the corporation for money loaned to it amounting to \$3000, that he acquired all of its stock, became its president and director, and took possession of the corporation, sold its business and applied the proceeds to the \$3000 indebtedness, and denied that the Rittenbergs were doing business as alleged and that he had any money or thing of value belonging to said corporation.

The decree found the facts as to the contract to be as alleged in the bill, that appellant Rittenberg acquired the capital stock of said corporation and complete control of it, and so dealt with its property and assets as to evade payment of the obligation due complainant, and decreed payment to complainant of the sum claimed.

That such a contract was entered into between appellee and appellant corporation, and the latter ceased to do business, and its property and assets were taken over by appellant Rittenberg, seem to have been established beyond controversy. The main questions argued are whether the evidence supports holding appellants liable for the loss to which appellee was put by the failure of appellant corporation to carry out its contract, and whether such loss constituted a debt within the meaning of said section 53 of the Corporation Act, which provides that after a corporation's "cessation of business leaving debts unpaid, any creditor may bring suit in equity * * * against all persons who are liable in any way for the debts of the corporation."

It was held in Standard Distilling Co. v. Coal Co., 239 Ill. 600, in a like suit, based on a very similar state of facts where, as here, the creditor's claim was unliquidated and

arose from refusal of the corporation to carry out its contract, that the suit could be maintained under said provision of the statute without first obtaining a judgment against the corporation, and that the statute is designed to aid creditors in the collection of their debts, and permits a suit in equity for that purpose to charge anyone who is liable for such debts.

In that case one Adams and one Jones, who owned about all of the stock of the Adams Coal Co., devised and executed a scheme to use the money necessary to buy the stock of the Springfield Coal Mining and Tile Co., and to become its officers, and then convey its property and assets to the Adams Coal Co., of which Adams was president, and put the Springfield Co. out of business. Thereafter the latter company ceased to do business, and the Adams Coal Co. refused to carry out the contract of the Springfield Company to furnish the complainant coal. The Court said:

"By this connected series of transactions a prosperous going concern, with assets to meet all its liabilities, was converted into one that had no assets and had ceased to do business. Neither money nor property was left to satisfy the obligations of the corporation, and a court of equity will not permit parties concerned in such transactions to evade payment of the obligations of the corporation which they have absorbed by such methods."

We have cited this case and referred to the facts thereof because of their analogy to those at bar, which were presented by proof before the Chancellor, whose findings and conclusion we see no good reason to disturb.

The evidence sufficiently shows that after appellee's order was accepted by appellant corporation, appellant Ruttenberg, with a view of acquiring its shares of capital stock, and also its property and assets, had an audit made of the company's books, which disclosed that it was a solvent concern with an excess of assets over liabilities of about \$5000; that he thereafter purchased all

its capital stock and paid certain creditors, becoming its creditor for about \$5000; that about three days after the audit the corporation borrowed \$5000 from a bank, which Ruttensberg later paid; that shortly after he acquired control of the corporation the latter was moved into the same building where the Art Lamp Manufacturing Co., which he controlled, conducted a similar business, and thereafter ceased doing business, and that he took over its entire assets in liquidation of his indebtedness.

The evidence also discloses that he had knowledge of appellee's contract, and tends to show that he sought and intended to evade appellants' corporation's obligations under it.

We find no error in the court's rulings or conclusions. Ruttensberg, for some unexplained reason, except that he was "a busy man," did not undertake to refute the inferences from the evidence which support the court's conclusion. We see little difference between the facts in this case and that cited, as to the scheme and the purpose and effect of it.

We think the decree should be affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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RICHARD JAMES,
Appellee,

vs.

GEORGE A. COKINS et al.,

On appeal of GEORGE A. COKINS,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

238 I.A. 624

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This record comes before us in an anomalous state. The suit was begun in equity against appellant and the Basin Gileonite Mining Company, later making the Uinta Asphalt Mining Company an additional party defendant.

The bill was predicated upon fraudulent representations and acts by appellant Cokins, whereby complainant was induced to purchase stock in said two companies, and in an oil company, and also to part with stock or "units" in a company called the Cardy-Cleveland Royalties Units, for some of which stock complainant had outstanding notes, held either by Cokins or some of said companies, the transfer of which the bill sought to prevent.

The two defendant companies were made defendants as parties to the alleged fraud. They appeared and filed a joint answer denying any fraud on their part and setting up a state of facts with respect to some matters contrary to the alleged false representations of appellant.

Appellant demurred, but withdrew his demurrer in accordance with a written stipulation between him and appellee, filed in the case and brought to the attention of the chancellor, which in effect narrowed the issues to appellant's liability

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THE UNIVERSITY OF CHICAGO

This report shows that the company is in a position to
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on the deal entered into between him and complainant for a sale or trade of the Gurdy units.

It is admitted, and appears by the decree itself, that the only issue left at the hearing was in substance whether appellee was induced by fraud and deceit of Cokins to part with fifty Gurdy units, and was entitled to recover their value at the time of the transaction with interest. In other words the cause of action was reduced to one of law, calling only for a money judgment. And the only relief given by the decree was for payment of \$3,020.75, the estimated value of said units with interest, and a direction in the decree for the issuance of a writ of capias ad satisfaciendum for collection of the sum if not paid within thirty days from entry of the decree.

After the issues were fixed by said stipulation the cause was dismissed for want of prosecution. At a subsequent term, after the court had lost jurisdiction of the cause and the parties, the order of dismissal was vacated upon a stipulation between appellee and Cokins only. The court never thereafter acquired jurisdiction of the other two defendants, nor were they thereafter formally dismissed out of the case.

It is somewhat difficult from the stipulation and this state of the record to determine upon what theory the chancellor heard evidence of all the ^{other} transactions complained of, all of which were subsequent to the Gurdy transaction. Notwithstanding the express stipulation that all said transactions, except the Gurdy deal, had been adjusted and all outstanding notes given by complainant had been returned to him or otherwise satisfied, and notwithstanding that said two defendant companies were no longer within the jurisdiction of the court, the hearing proceeded the same as if all the relief prayed for was still sought and defendant companies were still before the court as parties

defendant. For complainant made proof of all of said transactions, and introduced in evidence the unsworn joint answer of said defendant companies, which of course could be admissible against them only and not against defendant Cokins.

While no objection was made to the offer of said answer, it presumably was because of an entire misapprehension of both parties, and probably the chancellor, that the defendant companies were still before the court on the order vacating the dismissal of the case. For not only does said order purport to vacate the order of dismissal upon the stipulation of the "respective parties herein," but the decree recites that the cause came on for hearing on the bill and amendment thereto (which simply added one of said defendant companies as defendant) and upon the answer of Cokins "and the answer of the other defendants," and finds that the court "has jurisdiction of the parties and the subject matter herein."

Had the case been tried, as it should have been, hearing only such evidence as was material to determine the character of the Cardy unite transaction, as was evidently in contemplation of the parties to the stipulation, we think it too plain for discussion that the answer of the defendant companies, and evidence of subsequent transactions were wholly irrelevant to that issue. And while in cases tried in chancery or without a jury irrelevant evidence will generally be deemed not to have been considered where the decree or judgment would stand by disregarding the same, yet where it is apparent from the record, as here, that such evidence was manifestly considered and given weight in reaching the court's conclusions of fact it is the better practice to remand the cause for a hearing upon proper evidence.

We refrain from any expression as to the merits of

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the controversy as limited by the stipulation. While the issue as therein agreed upon is solely one of law, yet as it is not questioned that the suit was properly brought in equity that court may properly retain jurisdiction to grant the purely legal relief now asked for if the complainant is entitled thereto. Or if the parties still before the court so consent the case may be transferred for trial to the law side of the court without prejudice to appellee's right to prosecute the same as if it had been commenced on that side of the court. In that case the issues might be more intelligibly framed.

REVERSED AND REMANDED.

Oridley and Vitch, JJ., concur.

The committee is limited by the information which the
 House has received upon it and it is not possible for it
 to make any further progress in the matter. It is not
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1992-1993

JOHN N. PALLASCH,

Appellee.

vs.

EMIL KLEIN and
EUGIE KLEIN,

Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

238 I.A. 624²

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$575, assessed as plaintiff's damages on account of services as a real estate broker in procuring for defendants, as alleged in his statement of claim, a purchaser for certain real estate.

The controlling question presented is one of fact, whether plaintiff was the procuring cause of the sale. We do not think the evidence, which was heard without a jury, was sufficient to show that he was.

Many of the facts are uncontroverted. Emil Klein was the owner of a lot near the office of the Northwestern Packing Co., of which one Marnik was president and one Gyze, treasurer.

Plaintiff's son Paul, acting for him, took said Klein to the company's office and introduced the latter to Marnik. The property was offered for \$25,000. Marnik said "they" were not ready or able to pay that, and he would "see later on." A few weeks later young Pallasch called again and while he testified that Marnik said he was not ready, and Marnik testified that he dropped it "because that was too much money," yet neither he nor Klein ever again saw or heard from Pallasch in regard to the matter. In other words Pallasch seemed to have dropped the matter, for he made no further efforts to see or carry

1911

THE NATIONAL TRUST COMPANY
COLLECTORS AND MANAGERS OF THE TRUST

This report is filed in accordance with the provisions of the Trust Act, 1901, and is a statement of the assets and liabilities of the Trust as at the 31st day of December, 1911.

The assets of the Trust are as follows:—
Cash at bank, £100,000
Investments, £200,000
Total, £300,000

The liabilities of the Trust are as follows:—
Capital, £100,000
Reserve, £200,000
Total, £300,000

The assets of the Trust are as follows:—
Cash at bank, £100,000
Investments, £200,000
Total, £300,000

on negotiations with Marnik or with Klein. That was in the Fall of 1930.

One year later just before Klein went to Florida, Cyze's real estate agent, Lepowski, came to Klein, and asked his price. About a week later Lepowski brought Cyze to Klein and introduced him. They agreed upon a price, a few hundred dollars less than that submitted by Pallasch, and commissions. Klein never saw, or, so far as appears, heard of Cyze before. He left the matter to be closed by his agents and went to Florida, having signed a contract to sell to Cyze, to whom he deeded. While Cyze intended to buy it for the Northwestern Packing Co., and later deeded to it, Klein did not know of said company or that Marnik or Cyze were officers of it.

Plaintiff's theory of the case was that Cyze was a mere "dummy" for this company, and that it having ultimately bought the property, he was entitled to his commission because he first submitted it to its president Marnik.

The burden of proof was on plaintiff to show that his efforts were the procuring cause of the sale, and we do not think he sustained it. The evidence tends to show he abandoned all efforts after learning from Marnik that he was not ready to enter into any negotiations, and that the proposition was not entertained again for an entire year, when negotiations were brought about and perfected through the agency of others. The sale does not seem to have been effected merely because of the original introduction of Klein to Marnik, nor can it be said to be a necessary link in the chain of influences which actually brought about the sale. It is altogether too remote to be considered a proximate cause of the sale.

Not only must the judgment be reversed for this reason, but we find nothing in the record to connect appellant Susie Klein

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with any of the negotiations or ownership of the property.

Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Gridley and Fitch, JJ., concur.

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letter of credit.

However this is subject to order.

Gridley and Fitch, 11., corner.

236 - 29643

FINDING OF FACTS.

We find that appellee was not the procuring cause of the sale of the property in question, and that he had no contract of agency, express or implied, with appellant Susie Klein to sell the same.

378 - 29795

4586a

PEOPLE ex rel. WILLIAM J.H. SCHULTZ,
Appellee,

vs.

NICHOLAS R. FINN et al., Civil Service
Commissioners of the City of Chicago,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

238 T.A. 624

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a case of mandamus, seeking the same relief as prayed for in case General No. 29794, People ex rel. Cedarwall v. Finn et al., in which we have this day filed an opinion reversing the judgment and remanding the cause.

The records in the two cases, the pleadings, rulings, and orders, are practically alike, presenting the same questions of law and a like state of facts, the only practical difference being that the relator in one case held a different position in the classified service from that held by the other, both however holding under an original entrance examination instead of under a promotional examination of those in the next lower grade in the same line of employment, as is sufficiently set forth in the first plea to the petition. Another difference is that the record of this case shows that the demurrer to the answer was sustained. But the pleas are alike.

We hold in the other case that the demurrer to a like first plea was erroneously sustained, and that regardless of any other questions in the record, that error required a reversal of the judgment and a remanding of the cause. For the same reasons therein stated a like order must be entered in this case reversing the judgment and remanding the cause with directions to overrule the demurrer to the first plea, and for such further proceedings as are consistent with the opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Fitch, JJ., concur.

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393 - 29810

CITIZENS STATE BANK OF MELROSE
PARK, (a corporation), Appellee.

vs.

THE VILLAGE OF HILLWOOD,
(a corporation), Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

238 I.A. 624⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$500 in favor of plaintiff in an action of assumpsit, brought, as assignee of two choses of action, consisting of a claim for the value of material sold and delivered to, and used by, appellant village in its roadways as parts of permanent improvements. The village filed the plea of general issue and special pleas averring that there was no corporate action of any kind by its president and board of trustees authorizing or ratifying the purchase of said materials. The cause was tried without a jury.

There being no real controversy as to the essential facts the only question presented by the arguments is whether such a claim can be enforced in the absence of any formal action by the president and board of trustees, such as is required by section 13 of the act for the incorporation of cities and villages to create a liability against the municipality, or for the expenditure or appropriation of its money.

Appellant's argument rests entirely upon the failure of the village authorities to comply with the provisions of that section, and appellee's argument is based upon the

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contention that although the material was purchased by the president of the board without any formal action authorizing him to do so, it having been accepted and used in the culverts and roadways of the village, such acceptance and use constitute a ratification which estops the village from questioning its liability because of the failure to observe the statutory formalities.

It was held in Des Moines v. Walabach, 188 Fed. 906, that a city in respect to its business powers was subject to the same application of the doctrine of estoppel as an individual or private corporation, and the doctrine has been frequently enforced in our own state.

While the requisite formalities for creating such an obligation were not observed in the instant case, nevertheless the contract of purchase was one the village might lawfully make, and pay for under the appropriation it had made for purchases for streets and alleys, and the material bought was accepted and used in the public streets. Upon such a state of facts we think the doctrine of estoppel may be successfully invoked against raising the question of the absence of such formalities. Such was the distinct ruling in Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill., 220, where it was said: "But a city is not entirely exempt from all the rules of honesty and fair dealing that are applicable to individuals and private corporations. If a city may lawfully exercise a power, it may be equitably estopped to question the validity of its exercise on account of the manner in which it is done or the lack of required formalities, as right and justice may require." (Citing cases.)

Other cases applying the doctrine, are: New Athens v. Thomas, 82 Ill., 259; Schoenberger v. Elgin, 164 Ill. 62; City of Taylorville v. Hogan, 130 Ill. App. 72; Village of Bellewood

v. Nat'l. Meter Co., 192 Ill. App. 424; Drainage Commissioners,
v. Lewis, 101 Ill App. 152.

Without discussing them or the cases cited by
appellant, it is enough to say that the latter are readily
distinguishable in their facts or pleadings from these in the
former with respect to the applicability of that doctrine.

The judgment is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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402 - 29819

CONSOLIDATED PAPER CO.,

a corporation,

Appellee,

vs.

MAURICE FURNESS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 624⁵

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

The issue presented in this case is whether plaintiff which obtained judgment, had a right of action against defendant for a matured and unpaid debt of The Chicago Oyster Shell Co., the payment of which was guaranteed by defendant.

Plaintiff corporation was formed under the statute of the State of Michigan by consolidating under its provisions the Beekun & Rauch Company and another company. Pursuant to that consolidation it took over the physical possession of all the bills, accounts and notes receivable, all papers and effects, and property of the Beekun & Rauch Company including an inventory thereof.

The act under which the consolidation took place provides:

"The consolidated corporation so formed shall hold and enjoy all the powers, privileges, rights, franchises, properties, claims, demands and estates, which at the time of such union may be held and enjoyed by either of the said constituent corporations."

The act also provides that the consolidated corporation may enforce by suit or action all causes of action of said constituent companies.

At the time of such consolidation there was a matured and unpaid obligation of the Chicago Oyster Shell Co. to the

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RECEIVED BY THE DIRECTOR, FBI, 11/11/54

The above information is being furnished to you as requested by the Bureau of the Census.

Sincerely,
Director

every day, and the children are all very happy.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

Boehme & Rauch Co. for the purchase price of goods sold and delivered by the latter to the former, the admitted balance due being \$1,049.97, for which the judgment appealed from was entered.

When said obligation was incurred defendant Fushker entered into a guaranty by letter addressed to the Boehme & Rauch Company to pay the same. After the debt matured said Chicago Oyster Pail Co., gave notes, endorsed by Fushker, for balances on the account, two of which remained unpaid, at the time this suit was begun, and which were turned over to plaintiff with the other assets of the Boehme & Rauch Co. at the time of said consolidation.

As begun this suit was predicated upon said notes, and the promise to pay the amount due thereon. But as amended the statement of claim is predicated upon the facts aforesaid without any reference to the notes, plaintiff averring that it is the bona fide owner of all claims of said Boehme Company against said Pail Company, together with all evidences of indebtedness and securities held by the former and issued to the latter.

Defendant pleaded the original transaction, ignorance of any assignment to plaintiff of the guaranty, the giving and endorsing of said notes, claiming they were given in payment of the obligation, and in absence of any notice that the notes were not paid, he was not liable thereon.

While defendant's affidavit of merits hardly presents the issues on which the case was tried, and there was no proof of payment by notes, both parties regard the question above stated to be the only one presented, which is one of law arising upon unquestioned facts.

[illegible]

Defendant argues the case as if it were an action based solely upon the guaranty, and urges that it was not only not assigned, but non-assignable. It is conceded that the written guarantee was not formally assigned, but only physically turned over to plaintiff with the rest of the Beechme-Ranch assets.

According to plaintiff's theory of the case, and our view of it, the action rests not on the contract of guaranty itself, or an attempt to assign or transfer the cause of action arising thereon, but on the theory that after the claim against the Fall Company ripened into a debt and remained unpaid, the money then became due from defendant on his promise, which then ripened into a cause of action, upon which plaintiff could under section 18 of the Practice Act (Cahill's Stats. ch. 110, par. 18) maintain an action in its own name, it having become owner of the cause of action by virtue of said consolidation act. This theory of the right to maintain the action was recognized in a somewhat analogous case, Hearn v. Gelder, 224 Ill. App. 89, the court saying that "although a contract may be such that it is not assignable, nevertheless money which has become due under it may be assigned." (Citing cases.)

On this theory we think the action could be maintained, and the judgment may stand.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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www.bentley.com and The Bentley Education Center at www.bentley.com/edu

Approved: 14 November 1997 by the 1997 meeting of the JCR

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disease to return as soon as the patient is able to eat.

multistage, continuous, self-regulating, self-organizing and self-optimizing

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of the program is described in the report, 1960, 111.

and multi-year evaluation, all agreed on at least one item

1. *Chlorophyll a* (Chl *a*) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl *a* is located in the thylakoid membranes of chloroplasts. It plays a central role in the light reactions of photosynthesis, where it captures light energy and converts it into chemical energy in the form of ATP and NADPH. The structure of Chl *a* consists of a central magnesium atom coordinated by four nitrogen atoms in a porphyrin-like ring, with a long phytol side chain attached to one of the ring carbons.

4. *Investigations of the effects of the different types of the*

* *Journal of the American Statistical Association*, 1990, 85, 103-110

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420 - 29837

MRS. S. SNIGEL,
Appellee,

vs.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 625¹

ISIDORE GASEY and MEYER GASEY,
copartners doing business as
Gasey Brothers Department Store
and Liberty Cloak Shop,
Appellants.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a fourth class case tried in the Municipal Court of Chicago without a jury on a statement of claim for wages alleged to be due the plaintiff for services rendered as a clerk in the store of defendants, for five and one half days, at a wage and salary of \$30 per week.

The statement claims as due \$22.50 for 5-1/2 days and reasonable attorneys' fees, as prescribed by statute when suit is brought for wages. To the statement is attached an affidavit of claim. Defendants appeared and the case went to trial without objection, or any pleading on their part. Nor does it appear, nor is it contended, that either by any rule of court, or any express provision of the Municipal Court Act relating to such class of cases a pleading on the part of defendant is required. The regularity of proceedings in trying the case without any pleading on the part of defendants will therefore be indulged. And in view of the power of that court to make rules regulating procedure in that class of cases, we cannot in the absence of its rules from the record, assume that it is regulated by secs. 55 and 56 of the practice act providing for judgment as by default.

There is a further point to be noted in the foregoing
part of Chapter 10. It is to be noted that the
above alleged to be the plaintiff's own account of the
in a letter to the State of California, on the 10th day of
April, at a date not many days after the
The defendant claims to have been the only one
and defendant's statement, that, as mentioned in the
and will be brought to light. In the statement it is stated
is alleged to have been, defendant's account of the case was
a trial without objection, to the plaintiff's own story.
The case is now, as it is alleged, now either by the
side of justice, to my regret, provided it is brought out
at justice to make clear to justice as the law
The statement is correct. The plaintiff's statement
to justice the case against my position on the part of
defendant all through the hearing. And in view of the
fact of that case to make clear regarding procedure in the
case of course, as shown in the statement of the case from

On the record, therefore, the case comes before us on the sufficiency of the evidence to support the court's finding and judgment, and the rulings at the trial.

The relationship and terms of the contract between the parties are undisputed.

Plaintiff was engaged by defendants, who conducted a retail store for selling ladies dress goods, to work by the week as a "saleslady" at a salary, which at the time of her quitting the employment was \$300 per week. The week was understood to commence on Monday and to continue through the following Saturday and Sunday, for which she was to be paid, and was regularly paid on the following Monday. It was also understood that she was entitled to take one day off each week, which was usually Monday or Wednesday.

On Saturday, April 12, 1934, she left about noon for the usual hour allowed, and did not thereafter return to her duties.

Appellants contend, which we regard as the law, that the contract being one from week to week, under which plaintiff was to be paid at the end of the week, it was a contract for a definite period of a week at a time each succeeding week the employment under such arrangement continued, and therefore plaintiff could not recover for services rendered, in any one week if she quit the employment before the end of that week without cause or the consent of her employers.

Not questioning, but seemingly recognizing the force of this contention, appellee argues that as she was entitled to one day of the week and did not take that one day and worked the following Sunday, she was entitled to the half day she took on Saturday, and therefore was entitled to her salary. While the statement of claim, being for only 5-1/2 days service

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is inconsistent with that version of the facts, yet regardless of whether plaintiff did not take a day off on Wednesday of that week (though she testified both ways as to the fact) there is no proof that she worked on the following Sunday.

In order to make out a case entitling her to recover on such a contract the burden was on her to prove that she worked six full days, as the contract required, and this she did not do. That part of the record referred to as showing she worked for defendant on the following Sunday does not admit of that construction. It is simply to the effect that it was the arrangement that she should work on Sunday. Giving plaintiff the benefit of her uncertain and contradictory testimony as tending to show that she worked every day from Monday to Saturday noon, yet not having proven that she worked on Sunday and she having quit work Saturday noon voluntarily and of her own free will, and was not discharged as she testified, she is not entitled to recover under the law either upon the contract or quantum meruit, not having completed her full week. The contract is entire. (Angle v. Hanna, 22 Ill. 431; Hansel v. Erickson, 28 Ill. 257; Hoffstetter v. Gash, 104 Ill. App. 455.)

While in such a case plaintiff must show either that she quit for cause, or with the consent of her employers, she proved neither. She gave as the only explanation of her quitting that when she returned from lunch she learned a "strike" was on and she was told by employees leaving the store not to go back, and that she was afraid to go back, and went home. The court sustained objections to questions on cross examination whether she did not go out on a strike, and did not picket in front of the store on Sunday and carry a placard reading "This place is on a strike and unfair to union labor." We think the

court erred. These questions had a direct bearing on the cause of her quitting and her good faith in saying she was afraid to return. If she became a party to a strike or concerted action to prevent employment of any one at the store, she was hardly in a position to claim as good cause for quitting, that she was afraid on account of the strike. Another question might arise if she was not a party to the strike and was prevented from working by reason of it. As the strike was apparently the ground for her quitting, and relied on by her in justification of her breach of contract, the court should have permitted inquiry as to whether she participated in it.

Accordingly the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

Source: *Journal of the American Statistical Association*, 1997, 92, 103-114.

© 1997 by the American Psychological Association, 0893-3200/97/\$12.00 DOI: 10.1037/0893-3200.11.4.471

DATE: 11/11/1964

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Source: *Journal of the American Statistical Association*, 90, 1995, pp. 1011-1026.

...the right of the people to be free from the fear of violence...

in which \bar{y} is the mean value of y , σ_y^2 is the variance of y , and $\sigma_{\hat{y}}^2$ is the variance of \hat{y} .

... ..

and the number of life events are all affected.

• *Journal of Management Education* 25(10):1139-1150

... ..

29822

4590a

405 - 29822

CHICAGO TITLE AND TRUST CO.,
a corporation, Receiver, etc.,
Appellee.

vs.

NATHAN KLEN et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 625

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this action, plaintiff, as receiver of the American Bonding & Casualty Company, an insolvent insurance company, recovered a judgment against defendants, its former agents in Chicago, for \$22,138.72 for premiums alleged to be due to the company under the terms of the agency contract between the company and defendants.

The insurance company mentioned was an Iowa corporation doing business in Illinois prior to January 24, 1921, when receivers were appointed in both states. Plaintiff is the Illinois receiver. The defendants are partners doing a general insurance agency business in Chicago. In March, 1920, by a contract in writing, the company made defendants its Illinois agents, with authority to accept applications for plate glass insurance and issue policies for the same, collect the premiums and pay return premiums, and agreed to pay defendants for such services commissions equivalent to 43 per cent of the amount of the "net premiums received in cash, that is to say, the gross premiums received, less the amount of premiums returned to the assured, whether as refunds or reductions." The contract provided that on the 5th of each month, a detailed statement of all business done by the agent during the preceding month should be sent to the company and that "all moneys due to the Company as shown by the monthly

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238 I.A. 632

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IN THE COURT OF THE DISTRICT OF COLUMBIA
IN RE THE ESTATE OF JAMES EARL RAY, JR.
DECEASED
JAMES EARL RAY, JR., DECEASED
BY WILLIAM H. HARRIS, ADMINISTRATOR
VS.
THE UNITED STATES OF AMERICA
BY THE ATTORNEY GENERAL

THE UNITED STATES OF AMERICA
VS.
JAMES EARL RAY, JR., DECEASED
BY WILLIAM H. HARRIS, ADMINISTRATOR
VS.
THE UNITED STATES OF AMERICA
BY THE ATTORNEY GENERAL
IN THE COURT OF THE DISTRICT OF COLUMBIA
IN RE THE ESTATE OF JAMES EARL RAY, JR.
DECEASED
JAMES EARL RAY, JR., DECEASED
BY WILLIAM H. HARRIS, ADMINISTRATOR
VS.
THE UNITED STATES OF AMERICA
BY THE ATTORNEY GENERAL

statement," should be paid by the agent not later than sixty days after the month referred to in the account. The contract also provided that it might be terminated by either party giving to the other not less than thirty days' written notice.

The evidence shows that a large volume of business was done under this agreement; that all transactions between the parties prior to October 1, 1920, were fully settled; that from that date until the receivers were appointed, defendants issued insurance policies on which the premiums amounted to \$147,845.25; that during the same period they paid out on behalf of the company, \$36,802.94 for return premiums, leaving "net premiums" amounting to the sum of \$109,342.31, of which only about half was "received in cash" by them; that on January 21, 1921, and before they received any notice of the appointment of a receiver, they also paid out on behalf of the company, at the direction of its president, \$7,368.96, and paid other sums, amounting to \$846.35, not included in the above computation, for "glass replacements;" that upon receiving notice of the appointment of the receiver, defendants sent letters to all policy holders advising them of such appointment and directing them either to send their policies to the receiver, or, if preferred, defendants would file claims for them; that policies, on which the premiums were \$66,693.74, were either returned to them or to the receiver by the policy holders; that another policy, on which the premium was \$300.11 was never returned; that upon these policies defendants had collected premiums amounting to \$10,479.68, but that the remainder of the premiums upon such policies, viz: \$55,914.17, was never paid to or received by defendants from the policy holders.

These facts are not disputed. The parties disagree as to what amount, if anything, is due the company from defendants under the contract between them upon the basis of these undisputed

These facts are not surprising. The results of the

facts. The finding and judgment of the trial court are evidently based upon the theory that defendants are liable to the company for all premiums which were actually received by them, less the amounts paid by them on behalf of the company for return premiums, less commissions of 43 per cent of the remainder (such remainder being the "net premiums received in cash" by defendants), less the amount of the payments made in January, 1921, before defendants were notified of the receivership.

In the plaintiff's amended statement of claim, there is a table giving, in the first column, the amount of premiums on the business written during October, November and December, 1920, and January, 1921, in the second column the amount of "return premiums," in the third column the amount of "net premiums," in the fourth column the "commissions" and in the fifth column an alleged "balance" of \$62,403.15. This tabulation is made upon the assumption that all such premiums were collected by, or chargeable to, defendants, and the table shows upon its face that the amount of commission and the balance therein given are computed upon that basis, and are correct only if that assumption is correct. The amended claim of the plaintiff, as filed, is upon that basis, and the amount claimed on that basis was therefore the balance above stated. The affidavit of merits does not dispute the correctness of these figures, but states that defendants did not collect \$55,105.53 of the premiums tabulated, that the "appointment of said receiver made it impossible" to collect the same, and claims that defendants are entitled to have that amount, together with the items paid in January, 1921 (\$8315.31), set off or deducted "from the amount set forth in the amended statement of claim," that is, from the alleged "balance" of \$62,403.15. This theory of defendants is ingenious but clearly untenable, for the reason, if for no other, that such deductions, conceding them to be proper, must be made from the amount of premiums on all policies written, instead of from the

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balance after deducting commissions. To state the matter in another form, defendants claim they are entitled to commissions on all the net premiums whether the premiums were collected or not. Such, however, is not the contract of the parties, which provides that commissions shall be paid to the agent "on the net premiums received in cash." Since defendants claimed and proved that \$55,914.17 of the tabulated premiums were never "received in cash," either by the agent or the company, it necessarily follows that the amount of "net premiums received," upon which defendants are entitled to commissions, is the difference between that amount and the tabulated "net premiums" of \$109,342.31. Subtracting \$55,914.17 from \$109,342.31 leaves \$53,428.14 as the correct amount of "net premiums received in cash" by defendants, upon which they are entitled to commissions. Deducting such commissions (\$22,974.10) and \$6315.31 paid in January, 1921, from \$53,428.14 leaves \$24,138.73 due to the company under the terms of the contract. The error in defendants' contention consists in subtracting the uncollected premiums from the balance shown in the last column, instead of the balance shown in the third column, of plaintiff's tabulation.

It is contended that ordinarily the commission of an insurance agent is earned when the policy is written and delivered. Conceding that to be true, the rule does not apply here, for in this case the contract provides otherwise, viz., that the company agrees to pay commissions only upon the amount of net premiums received by defendants. Obviously, the words "net premiums received in cash" can have no other meaning than net premiums actually collected by defendants.

It is also contended that the receiver of an insolvent company cannot recover for any part of the unearned premium for the portion of the term of insurance after insolvency has taken place, nor maintain an action against an agent for the recovery

It is estimated that the number of persons who are employed in the various industries of the country is about 10,000,000. The number of persons who are employed in the various industries of the country is about 10,000,000. The number of persons who are employed in the various industries of the country is about 10,000,000.

of premiums received by the agent, the consideration for which has failed. The first part of this contention is made upon the authority of Farmers' & Merchants' Ins. Co. v. Smith, 63 Ill. 187, where a note had been given to the insurance company in advance for premiums subsequently payable, and the insurance company became insolvent. The court held that the consideration for the note had failed to the extent of the unearned premium, which was a good defense to an action on the note. The second part of the contention is based upon the case of Smith v. Binder, 75 Ill. 492, where a policy holder had paid an insurance premium to an insurance agent and a month later the insurance company became insolvent before the premium was paid over by the agent to the company. Upon learning of the insolvency, the policy holder demanded the return of his premium from the agent. The Supreme court held he was entitled to it for the reasons that the contract was rescinded, and as the premium never had reached the company and as the consideration for which it was to be paid over to the company had failed, the company was not entitled to the money, after the agent was notified by the policy holder to retain it. The court adds, however, quoting from 1 Chitty Pl. 36: "But, in general, if the money be paid over before notice to retain it, the agent is not liable."

We fail to see how either of these cases can help the defendants in this case. This is not a controversy between the company and a policy holder. As between the company and its agents, the moneys actually collected by the agents for premiums belong to the company. If such premiums had been paid over to the company by defendants, the company, and not they, would have been liable for any refunds that might be claimed by policy holders. (Smith v. Binder, supra.) So far as appears from the evidence, none of the collected premiums were returned to policy holders, and no policy holder is attempting to recover back

[illegible]

from the defendants any moneys which they collected. No such defence is claimed in the affidavit of merits, and there is no evidence to support such a claim, if it was made.

It is also claimed that the contract entitles defendants to commissions upon "outstanding premiums" in case of any termination of the contract. We think that clause refers to a termination by the act of either party, and not to one caused by insolvency of the company. But if this is not so, there is nothing in the language of that clause to indicate that the parties intended that if the company became insolvent, thereby terminating the contract, defendants should be entitled to commissions on uncollectible premiums. Evidently, the possibility of insolvency was not in the mind of either party when the contract was written, and hence no provision was made to cover that contingency.

The propositions of law which were marked "held" by the trial court are substantially in accord with the foregoing conclusions, and we think no reversible error was committed in refusing those offered by defendants which were marked "refused."

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

THE UNIVERSITY OF CHICAGO

It is also pointed out that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

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414 - 29831

FRANK ZIKMUND,
Appellee.

vs.

MARTIN BERRAVALA,
Appellant.

4591a
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

238 I.A. 625³

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this action in forcible detainer, the complaint filed by the plaintiff, Frank Zikmund, alleges that he is entitled to the possession of certain premises in Chicago. There is no proof in the record that such is the fact. The record shows that a prior suit was brought by the Chicago Title and Trust Company, as trustee, and that defendant had a lease of the premises from that company which expired before this suit was brought, and there is a hint that the plaintiff is the new lessee from the Trust company; but the only lease introduced in evidence is the old one, which has expired. Doubtless this was an oversight, but we have no power to correct the record the parties themselves have made.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

427

8881A.432

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

TO: THE SECRETARY OF THE INTERIOR
FROM: THE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT
SUBJECT: [Illegible]

[The following text is mirrored and largely illegible due to extreme blurriness and bleed-through from the reverse side of the page. It appears to be a memorandum or report.]

445 - 29862

RELIANCE ELECTRIC CO.,
a corporation,
Appellee,

vs. ~~and~~

SHE-MOON & CO.,
a corporation,
Appellant.

4592a
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 625⁴

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, the defendant seeks to reverse a judgment against it for \$648.70 upon a claim for work and labor performed and material furnished to the defendant by the plaintiff. By its affidavit of merits, the defendant denied any indebtedness to the plaintiff except the sum of \$28, which was tendered. There was a jury trial, evidence supporting the plaintiff's claim and evidence supporting the defense made by the affidavit of merits.

The bill of exceptions recites that an hour after the jury retired to consider their verdict, they requested the bailiff to ask the judge to send in to them the plaintiff's statement of claim; that defendant objected and the court sustained the objection and refused to give the jury the statement of claim; that about fifteen minutes later, the jury sent another message to the court, through the bailiff, in the form of a note on a piece of paper, inquiring what amount the plaintiff was suing for, whereupon the court, over the objection and exception of the defendant, wrote the figures "\$648.70" on the piece of paper and sent it back to the jury room. Error is assigned upon this action of the court.

W.C.P. 12

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In People v. Beck, 305 Ill. 593, 596, it is said: "The law is well settled in this state that it is error for which a judgment will be reversed for a trial judge to hold any communication with the jury after their retirement to deliberate upon their verdict, except in open court." In Grabtree v. Hagenbaugh, 25 Ill. 349, after the jury retired they sent for the trial judge, who went to their room and talked to them on the subject of the instructions which had been given them. The opinion states that this was manifestly done with no improper motive, that the "most the judge did was to decline to explain the meaning of the written instructions," that "we choose to assume" that no harm was done, but that "independent of its effect upon the jury, the judgment should be reversed, for the simple reason that such an interview did take place;" that if the verdict were allowed to stand because no harm was done, the door would be open in all cases to show that no injury had in fact resulted to any one, and that "such an inquiry should not be tolerated." In Mound City v. Mason, 362 Ill. 392, where a similar incident occurred, the court said: "It is error, for which a judgment will be reversed, for a trial judge to hold any communication with the jury in regard to the instructions in the case, except in open court. It is immaterial whether the instructions given were right or wrong."

While it is true that in this case the request of the jury was made in writing and answered in writing in the presence of defendant's counsel, who objected and saved an exception, yet the communication with the jury was not made in open court. In view of the unequivocal language of the Supreme Court in the quotations above given, we are constrained to hold that the action of the court in this case was error for which the judgment must be reversed and the cause remanded, and it will be so ordered.

REVERSED AND REMANDED.

The first of these is the fact that the law is not a mere collection of rules, but a system of principles which guide the judge in his decision. The second is the fact that the law is not a mere collection of rules, but a system of principles which guide the judge in his decision. The third is the fact that the law is not a mere collection of rules, but a system of principles which guide the judge in his decision.

452 - 29869

CHARLOTTE NIMMAN,
Appellee.

vs.

GLENNONS NIMMAN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 626

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In June, 1921, complainant secured a decree of divorce from defendant in the Superior court. The decree gave her the care and custody of two minor children and by agreement of the parties the decree also provided that defendant should pay to complainant for the support, maintenance and education of the children the sum of \$60 a month for one until she became of age, and \$55 a month for the other until she became of age, "and that thereafter the defendant shall pay to the complainant for the support, maintenance and education of each of said children such sums as the court may direct on proper application being made to the court." The older child, Genevieve, became of age on August 2, 1923, and in the same month complainant filed her verified petition stating that fact and that Genevieve was suffering from valvular heart disease and unable to earn her own living. After a hearing on this petition and defendant's oral answer to the same, an order was entered on September 21, 1923, finding the facts above stated and directing defendant to pay \$55 a month to complainant for the support and maintenance of his daughter Genevieve. No appeal was taken from that order. On November 22, 1923, the amount thus directed to be paid was reduced by the court to \$40 a month. From an order refusing to vacate the modified order of November 22, 1923, defendant perfected an appeal to the Appellate court. On March 7, 1924, on the petition

IN 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583,

of complainant, defendant was ordered to pay \$100 to complainant for her expenses and solicitor's fees in defending that appeal. No appeal was taken from that order but later in the same term a motion was entered to vacate it, which motion was denied; and from the order denying the motion to vacate this appeal is prosecuted.

In the first appeal above mentioned, the order appealed from was affirmed by this court. (See opinion in Gen. No. 39314, filed December 16, 1924.) We there held that the provisions in the divorce decree entered in June, 1921, relating to the support of the children, both before and after they reached the age of eighteen years, were entered by consent and upon the agreement of the parties, that defendant could properly consent to such portions of the decree and, having done so, they are binding upon him; that after the child Genevieve became of age, complainant made "proper application" to the court (as provided in said decree) to have the amount that defendant should pay for her support fixed by the court, and that after a full hearing the court found from the evidence, and so recited in its order of September 21, 1923, that the daughter Genevieve was incapable of working and supporting herself because of her afflictions and that defendant was fully capable of supporting her; and that not having appealed from said order, it was conclusive and binding upon him, citing the cases of Buck v. Buck, 60 Ill. 241, Storcy v. Storcy, 125 Ill. 608, and Miller v. Miller, 234 Ill. 16.

Upon this appeal, defendant's counsel contend that section 15 of the Divorce act, authorizing the allowance of solicitor's fees to the wife in divorce cases, applies only "during the pendency of the suit for divorce." That section after providing that "in all cases of divorce" the husband may be required to pay to the wife, "for her use during the pendency of the suit," such sums of money as may enable her to

maintain or defend her suit, provides further as follows: "And in case of appeal or writ of error by the husband, the court in which the decree or order is entered may grant and enforce the payment of such money for her defense and such equitable alimony during the pendency of the appeal or writ of error as to such court shall seem reasonable and proper."

In the early case of Jenkins v. Jenkins, 91 Ill. 167, the portion of the statute last above quoted was applied and enforced. There the defendant perfected an appeal to the Supreme court from a final decree of divorce containing provisions for alimony and solicitor's fees, and while such appeal was pending, on motion of the appellee the trial court made a further allowance of solicitors' fees to be used in the payment of her attorneys for attending to her case in the Supreme court; and in reply to defendant's contention that the trial court had lost jurisdiction to make such an order after the cause had been removed into the Supreme court by the first appeal, the court said, in substance, that except for the statute above mentioned the point would be well taken, but that "the section of the statute referred to in plain and express terms confers the power upon the Circuit court, and the law as enacted by the legislature must control."

That decision was followed in Elsas v. Elsas, 163 Ill. 160. There a petition was filed in the Circuit court by a divorced husband making leave to file a bill of review for the purpose of having the decree of divorce set aside, but the Circuit court refused to allow the petition to be filed, and an appeal was taken. Pending such appeal, the Circuit court entered an order directing and requiring the appellant to pay to the appellee solicitor's fees wherewith to pay for her defense to said petition on appeal. From that order, the defendant appealed, contending that section 15 of the Divorce act does not apply to a bill seeking to review a divorce decree. The court held the contrary and

said: "The statute has created an exception, in cases of divorce, to the general rule that the consummation of an appeal deprives the court wherein the decree appealed from was rendered, of power or jurisdiction to enter further orders or decrees in the case. In such cases, the statute, in direct terms, authorizes the court, after an appeal has been perfected, to grant and enforce an order requiring the husband to pay the wife a reasonable sum of money to enable her to defend her cause in the courts of review."

Again, in Harding v. Harding, 205 Ill. 105, it was held that pending appeals from a separate maintenance decree and from a contempt proceeding arising from defendant's disregard of such decree, the trial court has jurisdiction to allow solicitor's fees to complainant for services rendered after the decree, which were necessary in order to protect complainant's rights under the decree.

Under these authorities, we think there can be no question that the Superior court had power to make the order complained of.

Other errors are assigned on the record, but the foregoing is the only one argued in the briefs of defendant's counsel. The other alleged errors must therefore be considered abandoned or waived.

The order of the Superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

460 - 29877

THOMAS PATTON,
Appellee.

vs.

YELLOW TAXICAB COMPANY,
a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 626²

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks to have reversed a judgment against it for \$158 for damages to plaintiff's taxicab arising out of a collision between it and one of defendant's taxicabs. Defendant contends that there was no evidence of negligence on the part of defendant's driver; that plaintiff was guilty of contributory negligence, and that the judgment, which was upon a finding by the court without a jury, is contrary to the weight of the evidence. No brief has been filed by the plaintiff.

The evidence on behalf of the plaintiff tends to prove that some time after midnight on the night of May 9, 1923, plaintiff's taxicab, with a passenger, was being driven south on State street, near 41st street, at a speed of between fifteen and eighteen miles an hour; that it had been snowing and the street was wet; that the cab's lights were burning; that there were chains on both rear wheels, and there was no snow on the windshield; that there was a cabaret on the east side of State street, south of 41st street, in front of which several Yellow cabs were standing at the curb; that State street has a double line of street car tracks; that a Yellow cab was coming north in the east tracks and plaintiff's cab was going south "straddling" the west rail; that as plaintiff's

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cab approached a point nearly opposite the cabaret, one of the Yellow cabs which had been standing there "pulled out from the curb," whereupon the Yellow cab that was going north attempted to pass around the other Yellow cab and "pulled on the wrong side of the street" and skidded directly into the path of plaintiff's cab, causing a head-on collision.

The evidence on the part of the defendant was to the effect that defendant's cab was going north, between the east car tracks and the curb, at a speed of about twenty miles an hour; that it was bound for the Lorraine Gardens, ^{on} the west side of State street, south of 41st street; that as its chauffeur approached that point, he put out his hand, reduced the speed of the cab, turned to the left, and stopped, when he saw the plaintiff's cab twenty-five feet ahead of him going south in the car tracks; that the driver of plaintiff's car attempted to stop and skidded into the Yellow cab; that it was snowing and sleeting all night, and that plaintiff's cab had no lights on it and its windshield was covered with snow.

The plaintiff's testimony consisted of the plaintiff's driver, with some slight corroboration by the plaintiff's passenger. The defendant's testimony consisted of the defendant's driver, with some corroboration by another Yellow cab driver who witnessed the accident. We have studied the evidence in the record and are unable to say that the finding of the court is manifestly contrary to the weight of the evidence. In such cases, much depends upon the credibility of the witnesses, and as the trial judge saw and heard the witnesses, his means of determining their credibility was better than ours.

It is said, however, that the only evidence of negligence is the evidence of plaintiff's chauffeur that just before the collision defendant's chauffeur "tried to get out of the rails and his front wheels skidded there and threw him on the

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left hand side of the street," causing the collision in question; and from this premise, it is contended that skidding is not of itself evidence of negligence. Counsel are in error in assuming and contending that this is the only evidence of negligence, and that such skidding was the sole cause of the accident. If it is true, as plaintiff's chauffeur testified, that the Yellow cab was coming north in the northbound street car tracks, and attempted to cross over to the southbound tracks, on a wet and slippery pavement, and thereby drove his cab directly into the path of plaintiff's cab going south on the southbound tracks, it is a reasonable conclusion of fact that defendant's chauffeur was careless in the operation of his cab and that the skidding was the natural and probable consequence of his carelessness. It may be conceded that under other circumstances, such as the sudden application of the brakes on an automobile to avoid a sudden and unexpected danger (as in the case of Hair v. Hart, 189 Ill.App. 566, cited by counsel) mere skidding would not be sufficient evidence of negligence on the part of the driver to charge him with liability. In all cases, however, it is the duty of the driver to use such reasonable care as the circumstances require, to avoid injury to other automobiles lawfully using the highway. "The automobile is more likely to skid to a dangerous extent on a smooth or slippery pavement than any other vehicle. This is principally due to its speed and weight. This characteristic is well known to all users of the machine and must be taken into consideration in exercising reasonable care for the safety of others." (Berry on Automobiles, 4th Ed., sec. 222.)

Finding no substantial error in the record, the judgment is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

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ALBERT L. HERRY,
Appellee,

vs.

JOSEPH A. ROSEMAN,
Appellant.

4595a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 626³

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendant for \$2750 after a jury trial. The statement of claim alleges that defendant owes the plaintiff \$3800 for commissions on the sale of tractor mowers, under an agreement fixing the amount of such commissions at a sum equal to half the profit on each machine sold.

The agreement was not in writing. Defendant contends that the evidence shows that the parties were partners "in the tractor business," that there had been no final accounting between them, and that the court erred in not granting defendant's motions, made at the close of plaintiff's evidence and at the close of all the evidence, to direct a verdict for the defendant, upon the familiar principle that one partner may not maintain an action at law against his copartner under such circumstances. It is also claimed that the dispute involved a long and complicated account, which could not properly be tried before a jury, and that in any event the verdict is contrary to the weight of the evidence.

Whether a partnership existed in the tractor mower business is a question of fact (Fitch v. King, 279 Ill. 62, 65) to be determined by the intention of the parties as shown by the evidence. (Fousner v. First Nat. Bank, 141 Ill. 124, 126.)

"As a general rule, when the agreement provides for a division of profits simply, the law will infer a partnership. But even

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THOMAS A. STEIN
President
BY
WILLIAM J. STEIN
Vice President

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THIS IS THE SECOND OF TWO PAGES OF THE REPORT.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy.

The witness was not in Dallas. The witness was not in Dallas.

1. The first question is whether the defendant is a citizen of the United States. The defendant is a citizen of the United States.

then, the first and controlling element in the contract is, the intention of the parties as between themselves. If, from the agreement, anything appears which repels the inference of such an intention, then, as between the parties, they are not partners. *** There is no absolute rule of law, that a participation in the profits renders the participant a partner. It is only a presumption of law, which prevails in the absence of controlling circumstances, but is controlled by them." (Nichoff v. Dudley, 40 Ill. 400, 408.) Section 7 of the Uniform Partnership Act is declaratory of the common law rule in this respect. If the parties stipulate that their agreement as to profits shall not be construed as a partnership, that stipulation controls, as between themselves. (Samuel v. Ferson, 174 Ill. App. 334, 338); or if the same intention appears from the terms of the contract, if in writing (as in Faucet v. Stevens, 24 Ill. 483, 487), or from all the facts and circumstances in evidence, if the agreement is oral (as in Porter v. Ewing, 24 Ill. 618), such intention will prevail.

In 1918, defendant was the superintendent of grounds and club professional at the Westmoreland Golf club. He was also a partner in the firm known as Berry-Roseman Company, consisting of the plaintiff and defendant, formed to market a weed eradicator and handle seed, fertilizer and other things used on golf courses. Plaintiff was an elderly man and ran the office of that partnership. In the fall of that year, defendant invented a mowing machine, consisting of a tractor with mowers and rollers attached. It was intended to be used on golf courses. Plaintiff testified that he had "a separate agreement" with defendant regarding the sale of defendant's tractor mowers, that the agreement was made in a conversation between them, in which defendant

requested plaintiff "to take hold of the machine" and market it, promising to divide the profits equally, and plaintiff agreed to handle the sales on that basis from the office of the Berry-Roseman Company. Some advertising matter was prepared and sent out from that office, and the first machine was sold in April, 1919. The profit on that machine, amounting to a little over \$300, was at once divided equally between them. The next sale was in August, 1919, and during the following year and a half thirteen sales were made, on which plaintiff claims the net profits aggregated \$5975.00, while defendant claims the net profits were only \$208.51.

In January, 1920, defendant organized a corporation known as the Roseman Tractor Mower Company. Defendant testified that he asked plaintiff "to become a partner in the corporation" he was forming, but that plaintiff "refused to put any money into the tractor business." Plaintiff admits that such a conversation occurred.

During 1920 and 1921 defendant experimented with the mowing machine, made certain changes in it, assembled, set up and demonstrated the machines that were sold. He had a booklet prepared describing his machine and giving the prices, etc., in which the address of the Roseman Tractor Mower Co. was given as the Westmoreland County Club, where he was employed. Plaintiff's name is not mentioned in that booklet. The bank account of the Mower company was kept in its name by defendant, who signed that company's name to all checks. Defendant received mail relative to the mowing machine at the Westmoreland Club, and mail was also received at the office of the Berry-Roseman Co. by the plaintiff.

Matters went along in this manner, without any division of profits on the sales of the mower (except the first one sold) until January, 1921, at which time plaintiff's connection

with the tractor business came to an end, although the partnership known as Berry-Roseman Company was not terminated until May 1, 1921. In January, 1921, defendant prepared and submitted to plaintiff a statement purporting to show the amounts which had been received and expended on the machines sold up to that time. That statement showed that \$19,095.00 had been received from the sale of the mowers and that the total cost of the same, including interest on money borrowed from banks, amounted to \$15,395.24, leaving an apparent profit of \$3699.76. This statement was examined by plaintiff and he marked it "O. K. A. L. Berry." Defendant also signed his name under that of the plaintiff. Thereupon defendant tendered plaintiff a check for \$554.96 (fifteen per cent of the apparent profit shown by the statement), which plaintiff refused. Defendant testified that he did not know why plaintiff did not accept the check. Plaintiff testified that he told defendant that "there was a good many more machines than that sold, and that my commission would amount to a great deal more than that." Plaintiff also testified that defendant agreed that on sales thereafter made, of mowers concerning which inquiry had been made at the office of Berry-Roseman Company, plaintiff would be paid a commission of fifteen per cent. Five were sold after that, on which plaintiff testified the profit was \$2450.

In defendant's affidavit of merits he did not claim there was any partnership between him and the plaintiff in the matter of the sales of the mowing machines, but his affidavit states "that the sale of tractor mowers was something separate and apart from the scope of said partnership" of Berry-Roseman Company; that on account of the claims made by the plaintiff "for certain commissions to which he alleged he was entitled," defendant agreed to pay, and plaintiff agreed to accept, fifteen per cent of the net profits arising from said sales in full of all claims; that, believing the net profits amounted to \$3699.76, a settlement

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was reached in January, 1921, on that basis; and that after this suit was brought, defendant paid plaintiff \$554.96, "with the provision that trial of this case should continue as to the balance of plaintiff's demand." Plaintiff admits receiving that sum in the manner stated, but denies the alleged settlement.

The testimony of the parties shows that neither of them considered or understood that there was any partnership relation between them in the matter of the sales of the tractor mowers. Plaintiff testified: "I considered that my relations with Mr. Roseman in the tractor enterprise could be terminated by him at his will. I did not consider myself an employee. I considered I was working on a commission." Defendant testified: "I don't know whether you would call the fifteen-per-cent arrangement that I had with Mr. Barry a partnership, or what you would call it."

From all the testimony, we think it is apparent that the theory that there was a partnership between the parties regarding these sales, did not occur to either of them until the trial was nearly half over, when defendant's counsel for the first time made that claim. It seems clear from the evidence that no partnership in the sale of the mowers was intended by the parties, but that the agreement of defendant to pay the plaintiff for his services a certain share of the net profits arising from the sale of the mowing machines was merely a method of fixing the amount of compensation for plaintiff's services in marketing the same. The distinction between a partnership agreement and an agreement of that character is recognized in all the cases cited and relied upon by defendant's counsel.

As to the claim that the dispute between the parties involved a long and complicated account which could be tried better in a court of equity than before a jury, it has been repeatedly held that the difficulty of investigating a disputed account before a

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jury constitutes no legal objection to an action at law. (County of Cook v. Davis, 143 Ill., 151, 155; Samuels v. Varson, supra.)

We think the trial court committed no reversible error in saying, in answer to this objection, that this case could be tried "like any action for goods sold and delivered on open account."

There is, however, real merit in the final contention of defendant that the verdict is manifestly contrary to the weight of the evidence, so far as the amount of the verdict is concerned. The plaintiff testified, from memory only, as to the cost and the selling price of the mowers, while defendant based his testimony as to the cost of such machines upon the checks which he paid, all of which were introduced in evidence. But apart from this, as we have stated, defendant prepared a statement of the total receipts and disbursements, submitted it to the plaintiff, and the plaintiff approved it. While it is true that plaintiff claimed upon the trial that this statement was not in the same condition when produced on the trial as when he marked it "O. K.," the only difference he claimed in that respect was that three lines at the bottom had been added or changed, which purport to show a distribution of the profit so as to give plaintiff 15 per cent and defendant 85 per cent of the same. Assuming this distribution was not shown when the statement was approved by plaintiff (although it is denied by defendant that any change was made), the part which plaintiff admits he approved and signed shows that the total net profit thus agreed to at that time on the thirteen machines mentioned in the plaintiff's statement of claim, was \$3699.76. Hence, we think a verdict which includes any larger amount as commissions on the sale of these machines is clearly contrary to the preponderance of the evidence.

In plaintiff's brief there is a table, based upon the plaintiff's evidence, purporting to show that the net profit on

1. The first question is whether the evidence is sufficient to establish the fact of the defendant's guilt. The evidence is sufficient to establish the fact of the defendant's guilt.

these thirteen machines was \$6425 (instead of \$3699.76) and that the amount due to the plaintiff on that basis was \$2800.94. The jury gave the plaintiff \$2780. A similar computation, made on the basis of the profits shown by the approved statement, instead of plaintiff's recollection, as to the profits on the thirteen sales mentioned in the statement of claim, shows that the amount the jury should have allowed after making the same deductions shown in the table of plaintiff's counsel, was \$1437.42.

If, therefore, within ten days from the filing of this opinion, plaintiff will remit from the amount of his judgment all in excess of \$1437.42, a judgment for that amount will be affirmed, in which case each of the parties will stand his own costs in this court. If such a remittitur is not filed within the time stated, the judgment will be reversed and the cause remanded.

AFFIRMED IF REMITTITUR IS FILED;
OTHERWISE REVERSED AND REMANDED.

Barnes, F. J., and Gridley, J., concur.

These various matters are being handled at this time, and the
the amount due to the plaintiff on that date was \$100.00.
They gave the plaintiff \$100.00, a check, and the
the basis of the plaintiff's claim of the amount of \$100.00,
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the amount of the plaintiff's claim of \$100.00, and the
plaintiff's claim in the amount of \$100.00, and the

It, therefore, seems to me that the plaintiff
the plaintiff, plaintiff will have the amount of his claim
and all the amount of \$100.00, a judgment for that amount will
be entered, and the case will be closed with all the
facts in this case. It seems to me that the plaintiff
the case, and the judgment will be entered and the case
closed.

REMARKS BY COUNSEL FOR DEFENDANT
COUNSEL FOR DEFENDANT AND PLAINTIFF
COUNSEL, J. L., and COUNSEL, J. L., and COUNSEL, J. L.

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506 - 29948

EDWARD S. DEGAN,

Appellant,

vs.

MARTIN G. HECKARD et al.,

Appellees.

4596a
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2304 A. 626⁴

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, the complainant seeks to reverse a decree dismissing, for want of equity, his bill to remove, as clouds upon his title to four lots in Chicago, certain building restrictions thereon appearing of record.

The premises in question abut upon Bryn Mawr avenue, between Magnolia and Lakewood avenues. Two of the lots front upon Magnolia and the other two upon Lakewood. They are known as lots 1, 2, 47 and 48, in Block 2, in Cochran's Third Addition to Edgewater, which is a subdivision eighty acres in extent, bounded on the north by Bryn Mawr avenue and on the east by Broadway. The subdivision was made in 1890. Soon after, the four owners of the subdivision partitioned it among themselves and Marcellus E. McDowell became the owner of lots 1 and 2 in block 2, and John A. McDowell became the owner of lots 47 and 48. In March, 1909, lots 1 and 2 were conveyed to the defendants, Martin G. Heckard and Leonora P. Heckard by the trustees under the last will and testament of Marcellus E. McDowell, deceased (who are also defendants), and at the same time, lots 47 and 48 were conveyed to said Heckards by John A. McDowell. Each of the deeds conveying said lots contains express covenants providing, in substance, that for a period of twenty years from the date of such deed no flat or tenement building, nor any building the cost of which was less than \$3000

(excepting stables on the alley line), should be built on said lots without the grantor's written consent, and that no structure constituting an obstruction to the view should be erected during the same period within twenty-five feet of the front street line, without such consent. In June, 1922, said Heckards conveyed said lots to complainant "subject to restrictions of record."

The building line is marked upon the plat of the subdivision and the partition deeds do not contain any building restrictions. But John L. Cochran, who was one of the four original owners, and who had full charge of the development and sale of the property, testified that in making sales, he used printed forms of contracts and deeds containing the same restrictions, in substance, as in the deeds to the Heckards. The parties stipulated also that with a few exceptions, the deeds of all the lots in blocks two and three of the subdivision "contained the same restrictions as to building line and character of improvement" as the deed to the Heckards, and that all the lots in the other fourteen blocks in the subdivision were sold subject to restrictions of the same general character, "to continue for a named period from the respective dates of such deeds, and which periods were not uniform in duration." This stipulation shows that out of a total of approximately seven hundred lots in the subdivision (exclusive of those fronting on Broadway), only three lots were conveyed without restrictions, and three or four others were conveyed subject to part only of the restrictions above named. In the block in which complainant's lots are situated, the entire frontage, except two and one-half feet, was conveyed subject to the same restrictions as were imposed upon complainant's lots, continuing in force twenty years from the dates, respectively, when the lots were conveyed. At the time this suit was begun, that period had expired as to all but twenty-one of the forty-eight lots in that block. In the adjoining block, - block 3 - all of

The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1900, in the several townships of the County of Cook, Illinois, as shown on the official list of the Board of Supervisors of Cook County, Illinois, for the year 1900.

the lots except three were sold subject to the same restrictions, and at the time this suit was brought the restrictions were still in force on more than half of the lots.

The evidence further shows that with one exception (not counting the lots facing on Broadway) the whole subdivision is now occupied by dwelling houses. The exception is a large apartment building on the southeast corner of Bryn Mawr avenue and Magnolia avenue, as to which property the twenty years' restrictive period has expired. Recently, the north side of Bryn Mawr avenue (which is not in the subdivision) has been improved with stores and apartment buildings, of the same general character as the buildings on that street at and east of Broadway. Complainant's property is vacant. There is evidence tending to prove that the most advantageous use to which it can be devoted at the present time is for sites for apartment hotels, having stores on the first floor fronting on Bryn Mawr avenue. There is also evidence tending to prove that the removal of the restrictions on complainant's property would injuriously affect the value of the remaining property in the same block.

The bill in this case was filed only a few weeks after the complainant acquired title to the premises in question. That he knew of the building restrictions on the property is not denied, and his deed shows that he took the property subject to such restrictions. It is fair to presume, therefore, that the restrictions were all taken into consideration in fixing the price of the property at the time it was sold to complainant, and if such restrictions affected the value of the property it is to be presumed that complainant received full advantage of that fact at the time he purchased the property. (Turney v. Shriver, 269 Ill. 164, 171.) In such cases it has been uniformly held that so long as the restrictions are reasonable and not contrary to public policy or some positive rule of law, the purchaser is bound by such re-

THE NEW YORK PUBLIC LIBRARY
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125 WEST 47TH STREET
NEW YORK 19

restrictions. (Turney v. Shriver, supra.) That the restrictions imposed on complainant's lots are reasonable and not contrary to public policy, was held in Van Sant v. Noss, 360 Ill. 401, where substantially the same restrictions upon lots in Cochran's Second Addition to Edgewater were considered.

It is not contended that the restrictions were unreasonable at the time they were made, but it is contended that because the twenty-years' period fixed in all such restrictions does not expire at the same time as to all the lots in the subdivision, there is a lack of uniformity in the restrictions, which, together with the alleged change in the character of the adjoining property, requires a court of equity at this time to hold them unreasonable and unenforceable as to complainant's property. We are unable to agree with this contention. The evidence regarding the alleged changes that have taken place refers only to the use now made of property outside of the subdivision. There has been no substantial change in the use of property within the subdivision. It is true that the owners of lots as to which the restrictions have expired may now, if they choose, sell their lots for business purposes, while complainant must wait a while before he can do so, but he knew that to be true when he bought the property. He is, in effect, asking a court of equity to relieve him from the consequences of his own contract, without any pretense of fraud, accident or mistake in making it.

The contention made by complainant that the restrictions are personal to the original grantors because they reserved the right to release them, and are therefore not enforceable except by the grantors personally, is, in our opinion, refuted by the reasoning of the court in Wigman v. Eisel, 376 Ill. 530, where it was held that the force of such a restriction does not depend upon the question whether it is a covenant running with the land, but rests upon the ground that one who purchases with notice of the

restriction will not be permitted to make use of his land in a manner inconsistent therewith. That case also shows the distinction between the right to enforce an express covenant and a mere easement by plat for the benefit of the other lot owners.

We are of the opinion that the chancellor did not err in sustaining the exceptions to the master's report and dismissing the complainant's bill for want of equity. The decree will therefore be affirmed.

AFFIRMED.

BARNES, P. J., and GRIDLEY, J., concur.

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DUFFIN IRON COMPANY,
Appellee.

vs.

KURT ROSENTHAL, doing
business as Kurt Rosenthal
& Co.,
Appellant.

4597
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

238 I.A. 626⁵

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT:

In an action for damages for breach of contract, tried without a jury, the court made a finding in plaintiff's favor for \$795, and, on February 23, 1924, entered judgment against defendant on the finding and he appealed.

In plaintiff's statement of claim it is alleged in substance that on or about December 15, 1921, defendant solicited plaintiff to bid upon the fabrication and erection of certain iron and steel structural work in connection with the building of a store and hotel for defendant on the corner of Morse and Greenview avenues, Chicago; that on or about December 27, 1921, the parties entered into an agreement, the material terms of which are evidenced by an exchange of letters (copies attached); that thereafter plaintiff completed the preparation of detailed drawings covering the work required to be done by it, and also commenced the fabrication of iron and steel forms and shapes and the purchase of necessary materials, for the purpose of performing its agreement; that after plaintiff had expended large sums on said work and was ready and willing to complete its undertakings, defendant attempted to repudiate the agreement and refused to permit plaintiff to complete its undertakings; and that thereby plaintiff has been greatly damaged, etc.

Page 1

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

INVESTIGATION OF THE
ACTS OF THE DEFENDANT

CHARGE

3381A. 626

1. The defendant, [Name], is charged with the following offenses:

(a) [Offense description]

(b) [Offense description]

(c) [Offense description]

(d) [Offense description]

(e) [Offense description]

(f) [Offense description]

(g) [Offense description]

(h) [Offense description]

(i) [Offense description]

(j) [Offense description]

(k) [Offense description]

(l) [Offense description]

(m) [Offense description]

(n) [Offense description]

(o) [Offense description]

(p) [Offense description]

(q) [Offense description]

(r) [Offense description]

The letters mentioned are three in number - one being a written proposal of plaintiff, dated December 23, 1921, and addressed to Kurt Rosenthal & Co., 11 S. LaSalle street, Chicago, wherein for the sum of \$7600 plaintiff proposed to furnish and set in place the structural and miscellaneous iron and steel work required for the building according to the plans and specifications of a certain named firm of architects. What the bid included is set forth in detail. The second letter, of the same date and similarly addressed, is signed by plaintiff "by E. E. Amory, Sales Engineer" and is in part as follows: "We hereby acknowledge your verbal acceptance of our proposal of even date. * * We will begin work on the shop drawings at once in accordance with the plans which we now have. We * * request that you advise us promptly if any changes are to be made as it is necessary that we begin work immediately in order to make the delivery that you require. We understand that you will prepare formal contracts for our signature within the next day or two." The third letter is written on the stationery of Kurt Rosenthal & Co., dated December 27, 1921, and addressed to plaintiff, and is as follows:

"Replying to yours of the 23rd inst., wherein you propose to do the steel and iron work for the building at Morse and Greenview Avenues, we hereby accept your proposition, with the understanding you had with our Mr. Rasel in regard to taking bonds. We will prepare your contract within the next day or two, and notify you when it is ready for signature.

Kurt Rosenthal & Co.

KRM:CM.

Per C. H. Rasel"

In his affidavit of merits defendant denied entering into any contract with plaintiff, or that it ever did any work for him, or that it had suffered any damage "by reason of any act done by defendant."

On the trial plaintiff called as witnesses E. E. Amory, its salesman, and Daniel Ruffin, Jr., its general manager, and also introduced in evidence the three letters and the plans and specifications of the building upon which plaintiff's proposal was

The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the United States National Bank, for the year 1917.

Committee on Finance: Mr. J. M. Smith, Chairman; Mr. A. B. Jones, Secretary; Mr. C. D. Brown, Treasurer; Mr. E. F. White, Auditor.

Committee on Administration: Mr. F. G. Black, Chairman; Mr. H. I. Green, Secretary; Mr. J. K. Lee, Treasurer; Mr. L. M. White, Auditor.

Committee on Legal Affairs: Mr. N. O. Brown, Chairman; Mr. P. Q. White, Secretary; Mr. R. S. Green, Treasurer; Mr. T. U. Black, Auditor.

Committee on Public Relations: Mr. V. W. White, Chairman; Mr. X. Y. Black, Secretary; Mr. Z. A. Green, Treasurer; Mr. B. C. White, Auditor.

Committee on General Affairs: Mr. D. E. White, Chairman; Mr. F. G. Black, Secretary; Mr. H. I. Green, Treasurer; Mr. J. K. Lee, Auditor.

Committee on Special Affairs: Mr. L. M. White, Chairman; Mr. N. O. Brown, Secretary; Mr. P. Q. White, Treasurer; Mr. R. S. Green, Auditor.

Committee on the Board of Directors: Mr. A. B. Jones, Chairman; Mr. C. D. Brown, Secretary; Mr. E. F. White, Treasurer; Mr. F. G. Black, Auditor.

Committee on the Management of the Bank: Mr. J. M. Smith, Chairman; Mr. A. B. Jones, Secretary; Mr. C. D. Brown, Treasurer; Mr. E. F. White, Auditor.

Committee on the Operations of the Bank: Mr. F. G. Black, Chairman; Mr. H. I. Green, Secretary; Mr. J. K. Lee, Treasurer; Mr. L. M. White, Auditor.

Committee on the Assets of the Bank: Mr. N. O. Brown, Chairman; Mr. P. Q. White, Secretary; Mr. R. S. Green, Treasurer; Mr. T. U. Black, Auditor.

Committee on the Liabilities of the Bank: Mr. V. W. White, Chairman; Mr. X. Y. Black, Secretary; Mr. Z. A. Green, Treasurer; Mr. B. C. White, Auditor.

Committee on the Capital of the Bank: Mr. D. E. White, Chairman; Mr. F. G. Black, Secretary; Mr. H. I. Green, Treasurer; Mr. J. K. Lee, Auditor.

Committee on the Reserves of the Bank: Mr. L. M. White, Chairman; Mr. N. O. Brown, Secretary; Mr. P. Q. White, Treasurer; Mr. R. S. Green, Auditor.

Committee on the Surplus of the Bank: Mr. A. B. Jones, Chairman; Mr. C. D. Brown, Secretary; Mr. E. F. White, Treasurer; Mr. F. G. Black, Auditor.

Committee on the Dividends of the Bank: Mr. J. M. Smith, Chairman; Mr. A. B. Jones, Secretary; Mr. C. D. Brown, Treasurer; Mr. E. F. White, Auditor.

Committee on the Profits of the Bank: Mr. F. G. Black, Chairman; Mr. H. I. Green, Secretary; Mr. J. K. Lee, Treasurer; Mr. L. M. White, Auditor.

Committee on the Losses of the Bank: Mr. N. O. Brown, Chairman; Mr. P. Q. White, Secretary; Mr. R. S. Green, Treasurer; Mr. T. U. Black, Auditor.

Committee on the Expenses of the Bank: Mr. V. W. White, Chairman; Mr. X. Y. Black, Secretary; Mr. Z. A. Green, Treasurer; Mr. B. C. White, Auditor.

Committee on the Income of the Bank: Mr. D. E. White, Chairman; Mr. F. G. Black, Secretary; Mr. H. I. Green, Treasurer; Mr. J. K. Lee, Auditor.

Committee on the Assets and Liabilities of the Bank: Mr. L. M. White, Chairman; Mr. N. O. Brown, Secretary; Mr. P. Q. White, Treasurer; Mr. R. S. Green, Auditor.

Committee on the Capital and Reserves of the Bank: Mr. A. B. Jones, Chairman; Mr. C. D. Brown, Secretary; Mr. E. F. White, Treasurer; Mr. F. G. Black, Auditor.

Committee on the Surplus and Dividends of the Bank: Mr. J. M. Smith, Chairman; Mr. A. B. Jones, Secretary; Mr. C. D. Brown, Treasurer; Mr. E. F. White, Auditor.

Committee on the Profits and Losses of the Bank: Mr. F. G. Black, Chairman; Mr. H. I. Green, Secretary; Mr. J. K. Lee, Treasurer; Mr. L. M. White, Auditor.

Committee on the Expenses and Income of the Bank: Mr. N. O. Brown, Chairman; Mr. P. Q. White, Secretary; Mr. R. S. Green, Treasurer; Mr. T. U. Black, Auditor.

Committee on the Assets and Liabilities of the Bank: Mr. V. W. White, Chairman; Mr. X. Y. Black, Secretary; Mr. Z. A. Green, Treasurer; Mr. B. C. White, Auditor.

Committee on the Capital and Reserves of the Bank: Mr. D. E. White, Chairman; Mr. F. G. Black, Secretary; Mr. H. I. Green, Treasurer; Mr. J. K. Lee, Auditor.

Committee on the Surplus and Dividends of the Bank: Mr. L. M. White, Chairman; Mr. N. O. Brown, Secretary; Mr. P. Q. White, Treasurer; Mr. R. S. Green, Auditor.

Committee on the Profits and Losses of the Bank: Mr. A. B. Jones, Chairman; Mr. C. D. Brown, Secretary; Mr. E. F. White, Treasurer; Mr. F. G. Black, Auditor.

based. Ruffin's testimony related principally to the damages which plaintiff claimed it had suffered. He testified in substance that the reasonable cost to plaintiff for the preparation of its shop drawings necessary to be made by it was \$210; that the plans of defendant's building required 73 tons of steel; that early in January, 1922, 65 tons of steel were secured from a steel company and the balance came from plaintiff's own stock; that certain steel was cut to the exact lengths required; that when plaintiff's work was stopped the market price of the 65 tons purchased had dropped \$4 per ton causing a loss of \$260; that the steel which had been cut was afterwards sold to the best advantage, though it had to be re-cut; and that the waste from the re-cutting amounted to \$5 per ton, or \$325, making a total of plaintiff's damages \$795. The amount of damages as so proved was not disputed by defendant. Rosenthal was a witness in his own behalf but Kusel was not called to testify or his absence accounted for.

It was urged on the trial (1) that defendant did not contract with plaintiff for the preparation and erection of the steel, and that if such a contract was made with plaintiff by Kusel, in defendant's name, it was not binding on defendant because Kusel did not have his authority, express or implied, to make it; and (2) that the correspondence shows that it was the intention of the parties to have a formal written contract executed by them before either should be bound. And substantially the same points are made by defendant's counsel in this court as grounds for a reversal of the judgment.

The following facts were disclosed, principally from the testimony of plaintiff's witness, Amory: Plaintiff, having learned that defendant was about to erect the building, sent Amory to solicit a contract for the steel work; that about December 15, 1921, Amory called at defendant's office, where he had a conversation with Kusel, who was apparently in charge of

the office, and who continuously from June, 1921, until shortly before the trial, was employed by defendant as superintendent of the construction of defendant's various buildings and was authorized to take orders for bids for such construction. At this interview Kusel told Amory that defendant was about to erect the building in question and that he would be pleased if plaintiff would submit a proposal for the furnishing of the steel, and, at the time, he handed Amory a set of the plans and specifications which had been prepared by defendant's architects. Amory took these papers to plaintiff's office where an estimate was made up of the different lengths, sizes and pieces of steel required, totaling 72 tons. On December 17th, Amory again called on Kusel and told him that according to said estimate plaintiff would agree to furnish and erect the steel work in the building, as per the specifications, for \$7600. Kusel then said that this estimate was satisfactory, and that an order would be given plaintiff for the steel, provided the latter would agree to take second mortgage bonds to be placed on the building in the amount of \$750, at 95% of their face value, or \$712.50, and the balance \$6887.50 in cash. Amory replied that he would submit this proposition as to manner of payment to plaintiff. On December 22nd, Amory again called on Kusel at defendant's office and for the first time met defendant, who participated in the conference. Amory said that plaintiff would accept the proposition, as previously suggested by Kusel, as to a part payment being made in second mortgage bonds, and he then handed to Kusel plaintiff's said written proposal of December 22nd, above mentioned. Kusel then told defendant that he was placing an order for the steel for the building with the plaintiff company, whereupon defendant said "All right." Kusel also told Amory that plaintiff's proposal was accepted, that a formal written contract would be prepared within a few days, but that, as speed was necessary, he wished

plaintiff would start at once upon the work without waiting for the signing of such contract. On the same day Amory wrote and mailed to defendant from plaintiff's office the letter of December 22nd, above mentioned. On the trial this original letter was produced by defendant from his office files. On December 27th, the written contract not having been drafted, Amory again called on Kusel, who stated that he had not had time to draft the contract. Amory said: "We are involving ourselves in expense and must have the contract or some written authority." Whereupon Kusel went into one of defendant's private offices and, after a few minutes, returned with the typewritten letter of December 27th, above mentioned, which Kusel then signed in defendant's name and handed to Amory. The letters "KR:CM," in the lower left hand corner are suggestive of the fact that it had been dictated by defendant to a stenographer whose initials were "CM." Defendant on the trial denied that he had dictated the letter, but stated that at that time there was no person in his office other than himself with the initials of his name, "K.R." Some time in January, 1922, plaintiff learned that defendant had employed a new architect and contemplated making certain changes in the plans of the proposed building. Ruffin called on this architect, and suggested that in making the new plans he adhere as closely as possible to the prior plans as the steel had been cut to lengths to correspond therewith. Finally the new plans as drafted were submitted to plaintiff and upon request it made a new estimate, which was higher than the original one because of substantial changes in the plans. When defendant saw the new estimate he objected to the increased cost for the steel and finally told Ruffin in February, 1922, that he would not have any further dealings with plaintiff. Ruffin testified that at this interview defendant did not say anything to him regarding lack of authority on the part of Kusel to make the original contract for

the steel. On the trial defendant testified that he always personally signed contracts for materials on his buildings, that he never authorized Kusel to sign any such contracts in his name and that the first time he ever saw the letter of December 27th, signed by Kusel in his name, was during the trial. After defendant's refusal to allow plaintiff to further proceed with its undertakings as to the steel work, plaintiff proceeded to sell the 65 tons of steel as best it could, after making the re-cuttings mentioned, and in September, 1922, commenced the present action.

After a careful review of the present record we are not disposed to interfere with the finding and judgment of the trial court upon the grounds, as urged by defendant's counsel, either that Kusel had no authority to make any verbal contract for the steel, or any written contract therefor, as evidenced by the letter of December 27, 1921, signed by him in defendant's name and plaintiff's written proposal and letter of December 22nd, or upon the further ground that the minds of the parties had not fully met, because it was mentioned in said letters that a formal written contract would shortly be drafted for signature of the parties. We understand it to be the law of this State that where a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages, is justified in presuming that such agent has authority to perform a particular act, and thereafter deals with the agent, the principal is estopped, as against such person, from denying the agent's authority. (See Faber-Kaiser Co. v. Deo Clay Co., 291 Ill. 240, 244; Hugh v. Glassen, 163 Ill. 409, 414; Doming v. Hanson, 17 Ill. 272, 275.) Furthermore, in the present case, there is evidence tending to show that in the conference had on December 22, 1921, at which defendant and Kusel and Amory were present, defendant authorized Kusel to make a contract with plaintiff for the steel. And,

under the facts and circumstances as shown and the letters and documents in evidence, we think that no formal written contract was required to be executed in order to create a binding obligation. In Baltimore, etc. R. Co. v. People, 195 Ill. 423, 428, it is said: "Where the parties have assented to all of the terms of the contract, the mere reference to a future contract in writing will not negative the existence of the present contract." In Scott v. Fowler, 237 Ill. 104, 108, the Court, quoting from Bishop on Contracts, says: "If parties agree on terms, however precise, 'subject to the preparation and approval of a formal contract,' the concurrence of their wills is suspended, and where nothing further is done there is no contract. Yet the mere fact that the reduction of an informal agreement, oral or written, to a formal written one was contemplated or stipulated for, does not prevent the former from taking effect. The question, whether it does or not, depends upon what the parties intended." (See also Sanders v. Pettibitzer Co., 144 N. Y. 209, 214; Whitted & Co. v. Fairfield Cotton Mills, 210 Fed. Rep. 725, 732; Cohn v. Plumer, 88 Wis. 622, 626.)

The judgment of the Municipal Court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

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ALFRED B. BOWMAN, Appellee.

vs.

HENRY SCHREIL, Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 627

MR. JUSTICE SHIRLEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$389.95, rendered against him by the Municipal court of Chicago on April 23, 1924, in an action for damages to plaintiff's sedan automobile, occasioned by defendant's touring car colliding with it on the afternoon of July 17, 1921, in the intersection of Gray avenue and Grant street at Evanston, Illinois.

The cause was tried before the court without a jury. Three eye-witnesses to the accident testified, - plaintiff and defendant, and one Sibelius, called by plaintiff, who at the time was walking west on Grant street east of and near the intersection. Gray avenue is a north and south street and Grant street, running east and west, intersects it at right angles. There is a jog in Gray avenue, - its east curb line north of Grant street being several feet west of its east curb line south of Grant street. As to the details of the accident plaintiff's testimony, supported by Sibelius' in essential matters, is decidedly at variance with defendant's. Plaintiff testified in substance that he was driving his sedan north on Gray avenue approaching the intersection at a lawful speed; that he reached the intersection first and when he reached it he saw defendant's touring car coming from the east on Grant street and being then more than 50 feet east of the intersection; that he continued on at the same speed, swerving slightly to the west

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and then again to the north on account of the jog in the street; that as he was nearly across Grant street defendant's touring car, traveling at an excessive rate of speed, struck a rear wheel of his sedan; and that after it had been pushed and had skidded a considerable distance it turned over, causing damage which cost for repairs the sum of \$389.95. Sibelius testified in substance that plaintiff's sedan car was about in the middle of the intersection when he first observed defendant's touring car, which was then about 25 feet east of the intersection and moving west on the north side of Grant street and at a speed "about twice as fast" as plaintiff's sedan; that defendant's car kept on and struck plaintiff's sedan "after it had travelled almost entirely across Grant street." Defendant's testimony was in substance that when he first observed plaintiff's sedan it was about 50 feet south of the intersection, approaching it and moving at a speed of about 25 miles per hour; that at that time he (defendant) was also approaching the intersection in his car and was about 20 feet away from it and moving at a speed of about 20 miles per hour; that, thinking he had the right of way and that plaintiff would check or stop his sedan, he (defendant) kept on going, and then, seeing that a collision was imminent, he put on his brakes and stopped, and plaintiff's sedan "caught the left corner of the bumper on my car and jerked that to one side," and "kept on going until his right wheel struck the curb, and * * * waved until it finally toppled over on its left side."

No question is raised as regards the damage done to plaintiff's sedan or as to the amount of the court's finding. Counsel for defendant, however, contends that the finding and judgment are contrary to the weight of the evidence both on the questions of defendant's negligence and plaintiff's contributory

The first of these is the fact that the
 government has been unable to
 maintain a consistent policy
 towards the South. It has
 been vacillating between
 a policy of non-interference
 and a policy of active
 intervention. This has
 led to a general feeling of
 uncertainty and
 distrust among the
 people of the South.
 The second of these is the
 fact that the government
 has been unable to
 maintain a consistent
 policy towards the
 foreign powers. It has
 been vacillating between
 a policy of isolationism
 and a policy of
 active participation in
 the world. This has
 led to a general feeling of
 uncertainty and
 distrust among the
 people of the South.
 The third of these is the
 fact that the government
 has been unable to
 maintain a consistent
 policy towards the
 laboring classes. It has
 been vacillating between
 a policy of
 non-interference and a
 policy of active
 intervention. This has
 led to a general feeling of
 uncertainty and
 distrust among the
 people of the South.

negligence. We cannot agree with the contention. Nor can we agree with counsel's further contention that plaintiff was guilty of such a violation of section 33 of the Motor Vehicle Act as bars a recovery by him. It is provided in that section that "all vehicles travelling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." (Cahill's Stat. 1931, Chap. 95a, p. 2364.) While it is true that when plaintiff had reached the intersection he saw defendant's car approaching it from his right, it is also true, as shown by a clear preponderance of the evidence, that at that time defendant's car was more than 50 feet away from the intersection. Plaintiff, being in the intersection and then moving across it, had a right to assume that defendant would not propel his car at such an excessive rate of speed as to interfere with the safe passage across of plaintiff's sedan. The section of the statute should receive a reasonable construction, and, in our opinion, the holdings in the cases of Rupp v. Koehler, 175 Ill. App. 619, and Balson v. Wilson, 227 Ill. App. 386, are controlling in the present case.

The judgment of the Municipal Court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

YELLOW CAB COMPANY,
a corporation, Appellee,

vs.

STAFFORD-SMITH COMPANY,
a corporation, Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 627²

MR. JUSTICE CHIBLEY DELIVERED THE OPINION OF THE COURT.

On September 6, 1923, a judgment by confession on a lease was entered in the Municipal court of Chicago against defendant for \$820, for rent claimed to be due plaintiff for the months of May and June, 1923, amounting to \$800 and \$20 stipulated attorney's fees. By the terms of the lease, dated November 21, 1921, plaintiff leased to defendant from December 1, 1921 to March 30, 1925, at a monthly rental of \$400, the south half of the premises and building, known as Nos. 2432-2438 South Park avenue, Chicago, to be occupied for an automobile and repair shop and service station. Subsequently the court, on motion of defendant supported by its verified petition, ordered the judgment opened and gave leave to it to make its defense, the judgment to stand in the meantime as security. On February 9, 1924, after a hearing without a jury, the court found the issues in favor of plaintiff and adjudged that said judgment as confessed against defendant stand confirmed as of the date of its rendition. This appeal followed.

The following facts in substance were disclosed on the hearing: The entire premises were owned by Harold A. Howard and John G. Howard as trustees under a will, and in 1915, they leased the same for a period of 10 years, expiring March 30, 1925, to a certain livery company, which in turn assigned the

lease to the plaintiff, prior to its making of the sub-lease on which the judgment was confessed. The building occupied all of the land, having a frontage of 112-1/2 feet on South Park avenue, and a depth to the alley of 180 feet. Under the sub-lease defendant occupied the south half of the building and premises, or a space of 56-1/4 feet frontage by a depth of 180 feet. Subsequently the South Park Commissioners instituted in the Circuit court of Cook County a condemnation proceeding to take certain lands for the purpose of widening South Park avenue, and on April 19, 1923, judgment was entered therein. Only a portion of the entire premises, and of those covered by the sub-lease, was condemned for the purpose mentioned, viz, the east or front 132 feet, leaving the 48 feet nearest the alley. As to said entire premises, the amount of compensation awarded to the owners, tenants, and all parties interested was \$65,443.79, and it was provided in the judgment order that upon payment or deposit of said sum by the Commissioners they "shall have the right to take possession of, and damage, the property in respect of which said compensation shall have been so paid or deposited." Harold A. Howard testified that said compensation was paid to him on April 21, 1923, and that a warranty deed of the Howards, as trustees, conveying the east 132 feet of said entire premises to the South Park Commissioners was executed and delivered. This deed was introduced in evidence, showing that it was recorded on May 4, 1923. Under date of March 30, 1923, the attorneys for the South Park Commissioners wrote defendant that the premises occupied by it had been condemned and that final judgment would be entered within a few days, pursuant to which the owner would be asked to immediately transfer possession to the Commissioners, and in the letter notice was given that the premises "must be vacated after the order for possession is made by the court so that the Commissioners

can wreck the building," and the request made that defendant "arrange to vacate the building at the earliest possible date, but in no event later than April 15th." On April 24, 1923, one of the attorneys in plaintiff's legal department wrote defendant that he had just learned that the Commissioners had served notice on defendant to vacate the premises occupied by it, and further stating that "there is nothing that can be done but to vacate in accordance with notice served upon you; please do so as soon as possible and inform us of the date of your removal so that we can promptly inform our landlord." Instead of complying with these requests to vacate the south half of the premises and building which had been subleased to it by plaintiff, defendant continued to hold possession and occupy the same until shortly after July 1, 1923, about which time that portion of the building being within the east 132 feet condemned was dismantled and wrecked. And we fail to find evidence in the record that defendant, either at that time or subsequently, had surrendered possession to plaintiff, or to plaintiff's landlord, of the portion of the south half of said premises and building being within the remaining 48 feet nearest the alley. C. H. Smith, an officer of defendant, testified that shortly after said letter of April 24th was received by defendant, he called at the offices of the attorneys for the Commissioners and had a conference with one of them, and that "arrangements" were then made for defendant "to stay until the building was wrecked." David H. Greenberg, one of plaintiff's attorneys, testified in substance that on June 11th he called on Robert L. Pottinger, president of defendant, and demanded payment of \$1600 for four months rent on the sub-lease, at which time he received a check from Pottinger for \$400; that on June 29th he again called on Pottinger at the premises and received another check for \$400 to apply on rent and demanded payment by defendant of \$800, balance due for rent for the months of May and June, that

Pottinger objected to paying said balance on the ground of plaintiff "not having represented him in the condemnation proceedings," that Greenberg then told him that both plaintiff and defendant had been made parties in the condemnation suit as unknown owners, and that plaintiff had not been represented in said proceedings, and that Pottinger then said he would pay the \$800; that at this time (June 29th) defendant was occupying the entire south half of the building and that defendant's machinery was going and "they were grinding cylinders;" and that on July 3rd Greenberg again saw Pottinger at the premises and demanded payment of the \$800 and threatened suit if same was not paid, and that at this time defendant "had just begun to move."

Counsel for defendant contend that the judgment should be reversed, for the following reasons in substance: (1) When plaintiff by its letter of April 24, 1923, notified defendant to vacate the premises and deliver the possession thereof to the South Park Commissioners, plaintiff acknowledged that said Commissioners were lawfully entitled to the possession of the premises and, hence, had no right to collect any rent for succeeding months. (2) When, on April 21, 1923, the Commissioners, in pursuance of the judgment in the condemnation proceedings, paid to the owners the compensation awarded for the premises, the Commissioners under that judgment were entitled to the possession of and became the owners of the premises, and such right to possession and ownership at once cancelled the lease from the Howards to plaintiff and the sub-lease from plaintiff to defendant, and defendant properly made arrangements with the new owners (the Commissioners) to remain on the premises after May 1, 1923, and until the building was wrecked. (3) If, after April 21, 1923, (the date the Commissioners paid to the Howards the amount of the compensation awarded) plaintiff was entitled to recover

any rent from defendant by virtue of the sub-lease, it could only recover the proportionate amount of the rent reserved for that portion of the premises not taken in condemnation.

After considering the evidence we have reached the conclusion that there is no merit in any of counsels' contentions. The first two would suggest that the entire premises leased to defendant by the sub-lease were taken by virtue of the condemnation proceedings. But only the east or front 132 feet were so taken, leaving the 48 feet nearest the alley. And this being so, we think it clear under the decisions in this State that plaintiff was entitled under said sublease to recover the stipulated rent for the months of May and June, 1923, and especially as it appears that defendant used and occupied the whole of the premises and building, which had been leased to it, during both of said months. In Stabbings v. Village of Evanston, 136 Ill. 37, 42, it is said: "Under the authorities it seems that a tenant, where a portion of the leased premises is taken under the power of eminent domain for the use of the public, cannot, as against his landlord, claim an eviction, and be released from the payment of rent, and as his liability for the payment of rent continues after a part of his term has been taken by the public and appropriated to public use, he would be entitled to recover such damages as he sustained by the taking of his leased property by the public." In Carriagen v. City of Chicago, 144 Ill. 537, 544, it is said: "When a portion only of the land is taken, and a portion remains which is susceptible of occupation under the lease, we have held, following what we regard as the weight of authority, that the covenants of the lease are not abrogated, and that the tenant is bound by his covenant to pay full rent according to its terms. Stabbings v. Village of Evanston, 136 Ill. 37. And that in such case the lessee would not be entitled to apportionment or an abatement of the rent for the part of the land taken, but was bound to pay rent for the

any other time during the history of the world, it would

not be possible to find a more perfect example of the

principles of the science of the mind in any other

work of the human mind than in the present work.

It is not only a work of the highest order of

originality, but it is also a work of the highest

order of execution. The author has not only

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whole of the premises demised." The Court then proceeded to discuss the question as to what the correct rule should be "where the entire tract or lot of land embraced in the lease is taken for the public use," and, after reviewing many authorities, expressed the opinion (p. 543) that "the better rule is, where the estate of the landlord, in the whole of the demised premises, as well as that of the tenant, is extinguished by the condemnation proceedings, the liability of the tenant to pay rent ceases upon the termination of such estates," and further said (p. 544) that where only a portion of the demised premises is taken in such proceedings, "the rule laid down in Stabbins v. Village of Evanston, supra, applies." Defendant's counsel have cited several decisions of courts of review of other States wherein it is held in substance that, where only a portion of the estate demised to a tenant is taken in condemnation for the public use, the tenant is entitled to an abatement pro tanto of the rent, but these decisions are contrary to the rule adopted by our Supreme Court in said Stabbins and Cervigni cases, supra.

Defendants' counsel also contend that the trial court erred in refusing to admit in evidence the statement of claim (filed September 24, 1933) and amended statement of claim (filed in January, 1934) in a certain action, pending and undisposed of in the said Municipal court, wherein the Yellow Cab Company is the plaintiff and the two Howards are defendants, and wherein said Yellow Cab Company claimed the right to recover from the Howards a portion of the compensation paid to them by said Commissioners, because of the destruction of a portion of the Yellow Cab Company's leasehold estate in the entire premises, and also claimed the right to recover back certain monthly rents which, under its lease, the Yellow Cab Company had paid to the Howards. We do not think, under the issues in the present case,

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There is nothing in any of the evidence which tends to indicate a prior contact.

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Chair: Dr. James H. Cox, University of Illinois at Chicago, at 10:00 a.m.

2021-2022 3rd Quarter Report, 2021-2022 (2021, 2022, 2023, 2024, 2025)

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WILLIS, Walter Lee (bapt), One Willow and Cottage St. (b. 1872)

the Court erred in the ruling. Nor do we think that the court erred in refusing to admit in evidence a certain letter written by the Comptroller of the Yellow Cab Company to Harold A. Howard, dated May 5, 1923, or in refusing to admit Howard's testimony as to a certain telephone conversation which he had with said comptroller after said letter was received. In our opinion, even if all of this offered evidence had been admitted, the court would not have been justified in making any different finding than the one made, or in setting aside the judgment against defendant, as confessed on September 6, 1923.

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, F. J., and Vitch, J., concur.

EUSIE BASHN,
Appellee,

vs.

T. W. CHAMPION, trading
as T. W. Champion & Co.,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.238 I.A. 627³

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse a judgment for \$238, rendered after verdict against defendant by the Municipal Court of Chicago on June 26, 1924, in an action to recover commissions for services in bringing about certain sales of real estate.

When the action was commenced in November, 1922, the T. W. Champion Realty Agency and Loan Co., a corporation, was also made a party defendant, but during the trial plaintiff dismissed the action as to it, and the trial proceeded against T. W. Champion alone.

In December, 1921, Champion was engaged in business in Chicago as a licensed real estate broker, and he suggested to plaintiff, who was then employed by another real estate broker, that she commence working for him as a salesman, or saleswoman, and assist in effecting sales of real estate. According to plaintiff's testimony it was agreed that on all sales or leases brought about directly or indirectly by her efforts she would be paid one-half of all commissions received by Champion, and that Champion would make the necessary arrangements for the obtaining for her of a license as his employee; that she commenced working for him in January, 1922, and continued until about October 1, 1922; that early in the employment he brought to her a card,

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containing the certificate of the city collector of Chicago that she was the employee of a licensed real estate broker, which card she signed and returned to him; and that through her efforts she brought about six or seven different sales of real estate, upon which he had received commissions and upon some of which she had received moneys from him in accordance with the agreement, but upon others of which, although entitled to various sums, she had received nothing. Champion denied that he ever told plaintiff that he would take it upon himself to procure for her a license as his employee. It thus appears that by the arrangement she was to act, and subsequently did act, as a salesman, or saleswoman, for Champion in his business as a real estate broker, and in so acting assisted in the consummation of several sales. But the evidence does not disclose that plaintiff at any time during her employment had complied, or made any attempt to comply, with the statute of the State entitled "An act in relation to the definition, registration and regulation of real estate brokers and real estate salesmen," in force July 1, 1921, (Cahill's Stat. 1923, Chap. 17a), or had received the certificate of registration therein provided for, or had paid her registration fee as a real estate salesman or saleswoman.

Section 1 of that Act provides in part that "on and after January 1, 1922, it shall be unlawful for any person to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a certificate of registration issued by the Department of Registration and Education. * * It shall be unlawful for an association, copartnership or corporation to engage in the business or capacity, either directly or indirectly, of a real estate broker or real estate salesman, unless every member or officer, * * who actively participates in the brokerage business of such association, copartnership or corporation, shall hold a

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certificate of registration as a real estate broker, and unless every employe who acts as a salesman for such association, copartnership or corporation shall hold a certificate of registration as a real estate salesman."

In section 2 a real estate salesman, within the meaning of the Act, is defined to be "any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker * * to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchases or sale or exchange of real estate, or to lease or offer to lease, to rent or offer for rent any real estate, or to negotiate leases thereof or of the improvements thereon, as a whole or partial vacation."

In section 3 provision is made for an application for a certificate and what it shall contain, etc. In section 4 provision is made for the issuance by said Department of a certificate of registration and of a pocket card, and it is provided that "this certificate shall show the name and address of the applicant, and in case of a real estate salesman's certificate shall show the name of the real estate broker by whom he is employed," and that "the certificate of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed and shall be kept in the custody and control of such broker." In section 5 provision is made for the return of the issued certificate in case of the discharge or resignation of the real estate salesman. In section 6 it is provided that "the original registration fee for each real estate salesman's certificate shall be two dollars and the annual renewal fee shall be one dollar."

In section 16 it is provided that "any person or corporation violating the provisions of this Act shall upon conviction thereof, if a person, be punished by a fine of not less than one hundred dollars nor to exceed the sum of two

thousand dollars, or by imprisonment for a term not to exceed two years, or by both such fine and imprisonment, in the discretion of the court." And in section 17 it is provided that "the requirements hereof shall be in addition to the requirements of any existing or future ordinance of any city or village as to taxing, licensing or regulating real estate brokers."

In view of the provisions of said Act we are of the opinion that the trial court erred as a matter of law in entering the judgment appealed from. It appears that during the major portion of the year 1932, plaintiff was acting as a real estate salesman, as defined in said Act, for defendant, a real estate broker; that during the period of her employment she was engaged, as her whole or partial vocation, in assisting in the making of sales of real estate for customers of defendant; and that she made several sales as such salesman for which she claimed compensation or commissions, in part unpaid. And it further appears that in making said sales she was acting unlawfully, under the express provisions of said Act, in that at no time had she complied therewith and obtained the certificate of registration provided for as a real estate salesman. Her acts in making the sales being unlawful, they cannot be made the basis for a recovery against defendant. (Hendricks v. Richardson, Appellate Court, 1st Dist. No. 28989, opinion filed May 27, 1934, not yet published; 13 Corpus Juris, pp. 420, 423, secs. 351, 353, 355; Cincinnati Mut. Assurance Co. v. Rosenthal, 55 Ill. 85, 91; Penn v. Bowman, 102 Ill. 523, 530.)

Accordingly the judgment of the Municipal Court is reversed.

REVERSED.

Barnes, F. J., and Fitch, J., concur.

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GERARDO GORINO,
Appellee,

vs.

JACOB BASS, sued as
Jack Bass,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 627⁴

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in tort, there was a trial in the Municipal court of Chicago without a jury, on May 13, 1934, resulting in the court finding defendant "guilty in manner and form as charged in plaintiff's statement of claim," assessing plaintiff's damages at \$175, and entering judgment on the finding. Defendant appealed.

Defendant was the owner of a three-story building at Nos. 1201-1203 West Taylor street, Chicago, consisting of two stories with basement, and on the upper floors having several meeting and lodge halls. In May, 1921, he leased the stores and basement by written lease for a term of four years to one Michael Pope, who took possession. The front part of the store at No. 1203 was used as a barber shop. On June 1, 1921, by written lease, Pope sub-leased the barber shop with defendant's consent to plaintiff for a term of three years at a monthly rental of \$22, payable at Pope's office, and plaintiff took possession and there conducted a barber business. On the back of this last mentioned lease, in the printed form and headed "Consent to Assignment," is the signature of defendant, giving consent "to the assignment of the within lease to Gerardo Gorino (plaintiff) on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and the

performance of the covenants on the part of the second party as therein mentioned." Plaintiff remained in possession of the barber shop until a few days before the trial and always paid his rent to Pope. When he accepted the lease he knew that Pope was a lessee of the stores from defendant and of the occupancy of the halls above by other tenants of the owner. There was no covenant in the lease to plaintiff that either Pope or the owner should make repairs. Plaintiff however covenanted that he would permit Pope to have access to the barber shop for the purpose of making any needful repairs or alterations which Pope should see fit to make.

In plaintiff's statement of claim he alleges that his claim is for damages, "caused by and through the negligence of the defendant;" that plaintiff was a lessee of a barber shop in premises owned by defendant; that while plaintiff was in possession defendant "failed to make any repairs to the plumbing in said building," although frequently notified by plaintiff of the defective condition of said plumbing; and that on September 22, 1923, a water pipe in the ceiling of the barber shop burst, flooding the shop and damaging certain of plaintiff's chairs, mirrors, tools and implements to the extent of \$184.50.

In defendant's affidavit of merits he denied the negligence and liability as charged, and alleged that the premises were leased by him to said Pope, who in turn sub-leased them to plaintiff, and that under and by virtue of the terms of the lease to Pope defendant was absolved from any and all damages occasioned by defective plumbing or the bursting of water pipes.

Among the points urged by counsel for defendant as grounds for reversal of the judgment are (1) that the court erred in striking out and not considering much of defendant's testimony bearing on his liability for negligence as charged; and (2) that the court erred in refusing to admit in evidence the lease from

defendant to Pope.

On the trial plaintiff and several of his witnesses testified at considerable length concerning the details of the flooding of the barber shop by water coming from above on September 22, 1923, and as to the damage thereby occasioned. But the mere fact of the flooding did not make defendant liable to plaintiff for said damage without proof of the negligence as charged. (Hopkins v. Baber, 152 Ill. 273, 274.) The charge was in substance that defendant had negligently failed to make repairs in the plumbing above the barber shop, although frequently notified by plaintiff that because of leaks in overhead pipes the plumbing was defective. And to support the charge plaintiff testified to the effect that on several occasions prior to September 22, 1923, water had come down into the shop, indicating defective plumbing above; that when he called defendant's attention to the leakage, the latter promised to make the necessary repairs but never did so. Defendant denied making any such promises and testified to informing plaintiff that prior to his occupancy of the shop there had been water coming into the shop from above which was caused by tenants or occupants of the ledge hall occasionally obstructing toilets with newspapers and causing a temporary overflow, and that his investigation showed that this was the cause of the flooding of September 22nd, which ceased after the obstruction was removed. Defendant also testified in substance that about the time Pope, with defendant's consent, made the sub-lease of the shop to plaintiff, he (defendant) had a conversation with plaintiff, called his attention to the dampness of one of the walls of the shop, and said that this was the result of a recent temporary leakage of water, caused by occupants of the ledge hall so obstructing toilets as to cause an overflow, that such a leakage might occur again and that plaintiff had better place his barber chairs, tools, etc. away from the wall and not directly under a certain part of

February 1914

On the 12th of February 1914 the following

letter was received from the Hon. Mr. Justice

of the Peace, Mr. Justice of the Peace, Mr. Justice

of the Peace, Mr. Justice of the Peace, Mr. Justice

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the ceiling, so as to avoid possible damage; and that plaintiff replied that as he preferred a certain arrangement of the chairs he would take chances on the possible leakages, as he had little in the shop that could be damaged by water. This latter testimony was stricken out by the court, and in this we think the court erred. It bore on the question of defendant's negligence as charged and as to the extent of plaintiff's damages, and should have been considered. And we think that the court also erred in refusing to admit in evidence the lease from defendant to Pope. A copy of this lease appears in the record. In its 7th paragraph it is provided that the lessor (Bass) shall not be liable to the lessee (Pope) for any damage done to him or to his property "occasioned by the failure of lessor to keep said premises in repair," or "for any injury done or occasioned * * by or from any defect of plumbing * * gas pipes, water pipes or steam pipes * * or from the bursting, leaking or running of any tank, * * water closet or water pipe, drain, or any other pipe or tank in, upon or about said building or premises * * nor for any damage or injury arising from any act, omission or negligence of co-tenants, or of other persons, occupants of the same building * * or of lessor's agents or lessor himself, all claims for any such damage or injury being expressly waived by lessee." Whether or not these are covenants running with the land, we think that they are somewhat corroborative of defendant's testimony that when plaintiff took possession of the barber shop under the sub-lease from Pope, or thereafter, defendant did not make any express contract with plaintiff to keep the premises in repair, as testified by plaintiff, and they also tend to show that defendant was under no duty either to Pope or plaintiff to keep the premises in repair. In Hendel v. Fink, 8 Ill. App. 378 it is decided in substance that, in the absence of an express contract by the owner of a building to keep the premises in repair, he cannot be made liable for

The following are the results of the investigation conducted by the Department of the Interior, Bureau of Land Management, in the year 1900, in relation to the lands of the State of California, which are owned by the United States, and which are subject to the public domain.

damage caused to a tenant by water coming from a water closet above his goods and property. (See also Grange v. Hogue, 10 Ill. App. 592.)

For the reasons indicated the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

There is a great deal of work to be done in the field of

the study of the history of the people of the world.

(See also page 100.)

The study of the history of the people of the world is

of great importance and interest to all who are

interested in the history of the world.

It is a study which is of great importance and interest

to all who are interested in the history of the world.

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475 - 20892

SAMUEL S. MAXNER,
Appellee.

vs.

ARTHUR GINSER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 627⁵

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for false imprisonment, commenced in the Superior court of Cook County on July 8, 1922, a jury found the defendant, Ginsler, guilty and assessed the plaintiff's damages at the sum of \$200. Judgment was entered on the verdict and this appeal followed. Originally, two Chicago police officers, Wilbur Kelly and Joseph Seiler, were joined as defendants with Ginsler, but during the trial plaintiff dismissed the action as to them.

In his declaration plaintiff averred in substance that the three defendants, on June 16, 1922, wrongfully caused him to be arrested without a lawful warrant on the alleged charge of the larceny of 1,000 pieces of glazed roofing tile of the value of \$500, and to be imprisoned in a cell in the Summerdale police station, Chicago, for the space of seven (7) hours, when he was released on bail; that on the following day defendants also caused him to appear in a certain police court in Chicago, where, after a hearing, he was discharged; and that by reason of the acts of defendants he had been greatly damaged, etc. To the declaration the two police officers filed a plea of not guilty, and, by leave of court early in the trial, a special plea of justification. Ginsler filed only the plea of not guilty.

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First main paragraph of the document, containing several lines of text.

Second main paragraph of the document, continuing the narrative or report.

Third main paragraph of the document, concluding the text.

From the testimony of plaintiff and that of his witnesses, John W. Loftus, a lieutenant of police connected with the Sumnerdale police station, it appears that certain valuable tile, owned by Gisinor, had disappeared from the place where it had been stored near Gisinor's place of business at 5517 Broadway, Chicago; that Gisinor, believing it had been stolen, reported his loss to the police, and officers Kelly and Seiler were assigned to investigate the matter; that they made certain investigations, which were participated in by Gisinor, and they left a notice at plaintiff's office for him to come to the police station; that, in response to the notice, he arrived there about 4 o'clock on the afternoon of June 16, 1922; and that after considerable conversation, participated in by plaintiff, one Degener, defendant, the two police officers and Lieutenant Loftus, defendant signed a complaint and, by order of Loftus, plaintiff was locked up, and about 11 o'clock p. m. of the same day was released on bail. During the cross-examination of plaintiff and Loftus, defendant's attorney sought to elicit from them certain facts and circumstances which were developed in the course of said conversation tending to show that the tile had been stolen by plaintiff, or by his direction, but the trial court would not allow said facts and circumstances to be shown solely on the ground that defendant had not filed a plea of justification. And during the direct examination of defendant the trial court, for the same reason, would not allow defendant to testify to certain facts and circumstances, which were discovered in said investigations and which tended to show that plaintiff was guilty of the larceny of the tile. In these rulings we think that the court committed error, prejudicial to the defendant, in that the testimony was proper to be heard by the jury in mitigation of the exemplary damages which plaintiff claimed, and which apparently the jury gave him, as he introduced no proof of actual damages except a possible liability of

[illegible]

§50, to an attorney who assisted him in obtaining bail. We understand it to be the law in false arrest or imprisonment cases, where no special plea of justification has been filed but only a plea of the general issue, that evidence of the facts and circumstances surrounding the arrest, tending to show that the defendant so far as he participated in it was not actuated by malice, may be admitted in mitigation of exemplary damages. (25 Corpus Juris, p. 537, sec. 141; Bath v. Smith, 54 Ill. 431, 433; Miles v. Easton, 60 Ill. 361, 365; Cookman v. Tuttle, 75 Ill. 361, 365; Harria v. Schliak, 200 Ill. App. 302, 306.) We think there should be a new trial of the case.

Accordingly, the judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Fitch, J., concur.

4603a

NETTIE L. PARKER,
Appellee.

vs.

YELLOW CAB COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

238 I.A. 628

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries sustained by plaintiff while a passenger in one of defendant's taxicabs, the jury returned a verdict in her favor for \$7500, and on April 26, 1924, the court entered judgment on the verdict and defendant appealed.

The accident occurred on February 16, 1922, about 6 o'clock p. m., on Michigan boulevard, just south of Lake street in the city of Chicago. The taxicab was moving north on the east side of the boulevard. Plaintiff was seated inside the cab on the left side and beside her a friend. Between the driver, seated on the left side of the front seat, and the passengers, there was a glass partition, reinforced with a net-work of wire. Immediately south of Lake street several automobiles were standing abreast, facing north, awaiting the signal of the traffic officer to advance. One of these automobiles standing nearest the safety-island, but about seven feet to the east thereof, was a certain Cadillac car. In approaching Lake street the driver of the taxicab so negligently drove the cab that the right front part of it forcibly collided with the left rear part of the Cadillac car, causing an interlocking of the parts and considerable damage to both vehicles. Plaintiff was thrown suddenly forward, striking the glass partition and breaking it, and causing several severe cuts on her face and one on

Abstract

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SECRETARY OF THE ARMY

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Approved by me in regard to a change of period

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• Polymers: A material that can be formed into a long chain of repeating units.

THE NATIONAL ARCHIVES COLLEGE PARK, MARYLAND

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1944

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her left knee. Her feet, being against the heater on the floor of the cab, were turned over or twisted under her, and she was thrown down. After being lifted out of the cab she experienced severe pain in attempting to stand on her feet, and was taken to a hospital.

The only grounds urged for a reversal of the judgment are that the damages are excessive, and that the excessive amount was largely due to certain prejudicial remarks made by plaintiff's attorney in his closing argument to the jury.

After a careful examination of the testimony of the various witnesses bearing on the extent and permanency of plaintiff's injuries, we cannot say that the amount awarded by the jury is excessive. Plaintiff testified in her own behalf and she called as witnesses Dr. Egan, who treated her from shortly after the accident until the latter part of April, 1933,

Dr. Isenman, who treated her in June, 1933, and thereafter, and Dr. Krohn, who examined her on March 24, 1934, for the purpose of testifying on the trial as to her injuries and condition.

During plaintiff's cross-examination she was asked if she would submit to an examination as to her injuries by a physician appointed by defendant and she replied that she would, and on April 16, 1934, she was examined by Dr. Whitaker in the presence of Dr. Krohn, and on the following day Dr. Whitaker gave testimony as a witness for defendant, based on said examination. At the time of the accident plaintiff was 33 years of age and was vice-president of a florist company and actively engaged in the business. She had never before been injured and was in good health. On being taken to the hospital it was found that she had a cut on the left side of her face, about four inches long and extending from the cheek down under the chin, and another cut about two inches long under the right side of the chin; that there was a penetrating wound on her left knee which afterwards developed

infection; and that both ankles were sprained - the right severely. During the two weeks she remained at the hospital she suffered much pain, was nervous and unable to sleep. Thereafter frequent treatments of her face, knee and ankles were had. In the process of the healing of the cut on the left side of the face a so-called "keloid" growth developed in it and Dr. Moss advised an operation on the scar, which was performed under an anaesthetic in a hospital in June, 1932, by Dr. Isamen, and the growth removed. Subsequently the growth appeared again and, under Dr. Isamen's advice, many X-ray treatments on the scar were had in the endeavor to arrest further growth. These treatments were only partially successful, and at the time of the trial some of the growth remained, which still caused an itching sensation and constant pain or irritation, due to pressure "upon the nerve endings passing through the keloid formation." Dr. Isamen testified that in some cases "neither an X-ray nor anything known to medicine can stop the keloid tendency." Dr. Krohn testified to the probable permanency of plaintiff's sensations of pain or itching because of the "nerve that goes along the rim of the jaw that is right at the site of the pressure of this scar." Plaintiff testified that at the time of the trial her left knee still pained her, bothered her in walking, and required massaging; and that her right ankle was still weak and frequently caused her pain, when standing for a considerable time and particularly when there is a change in the weather. The amount of the verdict may be larger than under the evidence would have been sustained by a reviewing court ten years or more ago, yet consideration should be given to the present social and economic conditions and to the fact that the money value of life and health has appreciated and the purchasing power of money has depreciated in recent years. (Waisvila v. Illinois Central R. Co., 226 Ill. App. 113, 123; Fosch v. Chicago Ry. Co., 221 Ill. App. 241,

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254; Nelson v. Kagan, 217 Ill. App. 272, 285.) and in our opinion, under the evidence, we would not be warranted in reducing the amount of the verdict which the trial judge has approved.

As to the claimed prejudicial remarks made by plaintiff's attorney in his closing address to the jury, we do not think that because they were made the judgment should be reversed and the cause remanded for a new trial. They had reference to the tactics during the trial of defendant's attorney. His position at first was that the driver of the taxicab was not negligent. He, however, changed his position and, after the testimony was all in, admitted to the jury in his argument that defendant was liable and that plaintiff was entitled to recover damages, and stated in substance that the only question was the amount that plaintiff was entitled to receive. He then discussed at length the evidence bearing upon that question. In his closing argument plaintiff's attorney commented on this change of position on the part of defendant's attorney, and requested the jury to consider what the purpose of the change was, and suggested that perhaps it was to "curry favor with the jury. On objection being made, and defendant's attorney stating that the remarks were "an appeal to the passion, sympathy and prejudice of the jury," the court directed plaintiff's attorney to "argue the evidence." We do not think that the remarks or the incident had any effect on the size of the verdict or tended to prejudice the defendant in the minds of the jury.

Finding no reversible error in the record the judgment of the Circuit court is affirmed.

AFFIRMED.

Barnes, V. J., and Fitch, J., concur.

Page 10 of 10

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details of the adverse effects are listed below in table 1.

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He was married to Mrs. J. M. Smith, deceased.

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• **PROFESSOR**

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its objectives and if the results are consistent with their expectations.

PETERSEN MOTOR CAR & GARAGE COMPANY,
Appellee,

vs.

H. P. REGER and MARY A. REGER,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 628²

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Henry P. Reger and Mary A. Reger, the defendants, from a joint judgment against the defendants on a verdict in the sum of \$759.45 in favor of the Petersen Motor Car & Garage Company, the plaintiff, in an action brought by the plaintiff to recover \$900 deposited by the plaintiff with the defendants as security until the plaintiff made certain repairs on a building occupied by the plaintiff under a lease.

The repairs were to be made by the plaintiff in accordance with the following written agreement:

"June 28, 1921.

Petersen Motor Car & Garage Co.,
5538-42 Harper Avenue,
Chicago, Illinois.

Gentlemen:

Attention: Mr. Fairchild.

The following repairs are to be made in the above mentioned building:

All of the broken glass in the front windows and doors, rear windows and doors and skylight is to be replaced.

The roof is to be made water tight and repaired to prevent leaks from coming through.

Hardware is to be replaced on doors and windows where broken off.

Cement floor is to be repaired where broken up.

The front and rear doors where styles have been broken and smashed are to be repaired with new ones.

The cement window sill in the office which is now broken and smashed to pieces is to be replaced with new cement window sill.

The front of the building is to be painted.

I consider the above repairs necessary to put the building back into shape the same as it was when turned over to the Petersen Motor Car & Garage Company.

Very truly yours,

(Signed) H. P. Reger."

The defendants contend that the preponderance of the evidence does not show that the repairs were made as required by the terms of the agreement.

There are three principal items in dispute, namely, the repairs as to the skylight, the roof and the cement floor. The evidence on these issues is conflicting.

On behalf of the plaintiff, George A. Fairchild, president of the plaintiff company, testified that he personally saw the work done on the repairs; that the skylight glass was put in by A. G. Freer, a sheet metal man; that Freer rendered a bill which he, Fairchild, requested the defendant H. F. Reger to pay; that he, Fairchild, and Reger went over the building and picked out parts of the cement floor that should be repaired; that there was a cement sill in the front office window that had cracked out; that the cement man was sent over; that the cement man came from Reger; that the cement man "kind of went over" the places; that he put in the work; that he did the repairing; that he put in the new sill; that he, Fairchild, watched him do the work; that "where it had been cut through, from one wall to another it was ragged, the brick work;" that the cement man cemented that up; that "Mr. Farmer" sent a carpenter there who put in the new stiles and new jambs, took the big doors down, took them to his shop, put in the stiles and new panels, put in the new jambs at the garage for the doors to hang on, replaced the broken glass, such as the sheet glass, and did all of the work that had to be done; that he, Fairchild, hired painters - "Mr. Hemmet and Mr. Rodemaster" - who painted the work front and rear of the building; that the Knickerbocker Roofing Company repaired the roof shortly after July 1, 1921; that it took them approximately three weeks; that he, Fairchild, did not personally examine the roof to ascertain whether it was water tight; that Reger did not call his, Fairchild's, attention to the fact that

the roof leaked until a year afterwards; that William Owen, who bought the Petersen Motor Car & Garage Company, and took possession on July 1, 1921, did not tell him, Fairchild, that whenever it rained he, Owen, had to shift his automobiles from time to time because of the condition of the roof; that he, Fairchild, did not have a conversation with Reger in which he, Fairchild, discussed a deal he had for selling his lease for a certain amount of money.

H. G. Freyer testified on behalf of the plaintiff that he was in the sheet metal business; that he repaired the skylight; that he replaced one broken light by a new glass; that there were some others that needed putty and that "we" put putty in the rest of the glasses and cleaned out the conductor pipes; that he did not do the work personally; that his men did the work; that before "we" commenced the work he "went down and looked it over" with Fairchild; that the difference in what he first saw and when the men left was that the broken skylight glass was replaced and glass reset where needed; that he did not go back after the work had been done to see whether the skylight leaked; that he doesn't know whether it leaked or not after "we" got through with "our work."

Mark A. Cronin testified on behalf of the plaintiff that he was a roofing contractor; that he did the work on the building at Fairchild's direction; that "we" installed new flashing, tore out the flashing where the roof joined the wall, completely around the building, and put in new felt, new patches and secured it with new lath; that wherever the roof was worn, cracked or defective, "we" repaired these parts by putting on three thickness of felt, mopped in between and to the roof with roofing pitch; that "we" then mopped the top composition and covered it with gravel; that that was over the entire roof; that after "I" did this work for Fairchild in July, 1921, "we" were asked once in August, 1921, to repair the

the first looking north a road appeared; that William Street, was
called the Johnson Estate for a short distance, and then continued
a July 1, 1902, his car left him, and he continued to
along the road, and in 1911 his automobile from there to the
road at the junction of the road, and he, William, and his
and a conversation with Henry at which he, William, discussed a
and he had the feeling his house was a certain amount of money.
A. E. Fryer testified on behalf of the plaintiff that
he was in the hotel with William; that he noticed the plaintiff
but he noticed one looking light by a new glass; that there were
and always that night until that "but July in the year
The glasses and showed out the compound glass; that in 1912
it is in the north personally; that his car was left the car; that he
"saw" the work he "saw" him and looked it over; that he
also; that the difference in what he found out and when the man
and was that the person stopped there was noticed and shown
years when looked; that he did not go back after the work had been
and he was where the plaintiff looked; that he doesn't know
where it looked or was after "he" was shown with "he" said.
With A. E. Fryer testified on behalf of the plaintiff
that he was a telling conversation; that he did the work on the
looking to William's attention; that "he" looked new; that
and out the looking where the road joined the wall, and
against the wall, and put in new wall, new window and
with new wall; that however the wall was new, looked in
effective, "he" suggested these cases by passing on these witnesses of
and, stated in between and to the wall with looking with that "he"
and moved the two windows and covered it with glass; that the
he over the entire wall; that after "he" his wife and the plaintiff
July, 1911, "he" was with him in 1911, he still was

roof by Mr. Fairchild;" that he, Crenin, asked Fairchild to pay him the bill for the work done.

Henry P. Reger, one of the defendants, testified that Fairchild did not replace all of the lights in the skylight that were broken; that Fairchild replaced one or two lights; that there were 27 lights that were broken that Fairchild did not replace; that he, Reger, talked to Fairchild about repairing those broken skylights on a number of occasions during the months of July and August, 1921; that Fairchild said that if he, Reger, wanted any more glass put in, that he, Reger, could go ahead and put it in himself; that Fairchild said, "I have got my part now, I don't care what I agreed to do;" that when the question of the deposit of the \$900 was discussed, he, Reger, refused to turn over the lease unless he, Reger, was protected for the repairs, as two months had elapsed at that time and the repairs had not been made; that he, Reger, had the work of replacing the broken glass in the skylight done by the Hyde Park sheet metal man; that he removed the broken glass in the skylight and also some of the glass in the rear windows; that he, Reger, told Fairchild that unless he, Fairchild, did the work, he, Reger, would have it done, because the tenants were complaining about water coming down and they claimed they were losing cars; that Fairchild never made the roof water tight; that he, Reger, talked to Fairchild a number of times about it; that Fairchild said he had the Knickerbocker Roofing Company over there; that the reason why they did not do the work right was because they owed him a bill and just slighted the work; that the work on the cement floor was done in such a manner that it did not last three weeks; that he talked with Fairchild about it and that Fairchild said he guessed the fellow just patched it up with sand - didn't put in any cement; that he, Fairchild, said he

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1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796

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1944-1945

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1991-1992

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...and in the

Page 1, line 10 to line 12, "The following information is being provided to you for your information."

Shelton and the defendant were both found guilty of the same crime.

and were sent to Hunter, Texas, and elsewhere as well as to

James Wilson was, before the Revolution, an ardent supporter of the British cause, and was one of the signers of the Declaration of Independence.

Approved and Forth: _____

Admission Fee: \$1.00

CONFIDENTIAL

and the other two are the same as in the first case.

Sample No. _____

100-443887-100

U.S. DEPARTMENT OF JUSTICE

would get him back to fix it up but that Fairchild never did; that the front of the building was not painted at all; that he, Reger, had the roof refitted and made water tight, had the floor fixed and had the broken glass repaired.

William Owen testified on behalf of the defendants that he bought the Petersen Motor Car & Garage Company from Fairchild in June, 1921, and took possession on July 1, 1921; that some men came over and took some glass out of the skylight; that after they finished the skylight was in worse condition than it was before; that the Knickerbocker Roofing Company came there in August, September or October, and patched the roofs here and there, both sides of the garage and around the down spouts where they were supposed to be leaking; that after they got through the first time there was a heavy rain, and it took four men to keep the cars being moved about in the center of the garage so the water would not destroy the paint on them; that it was twice as bad as it was before; that the roof was never made water tight by Fairchild; that after the men got through he, Owen, went up and examined it; that there were numerous strips of tar paper that did not fit ⁱⁿ properly with the tar and there were large spaces in the roof; that you could see parts of the roof showing through on two or three dozen places all over the whole garage; that the Knickerbocker people were there about a dozen times to patch it up; that every time it was worse than when they started; that that continued practically a year; that when he took possession of the garage there were probably 8 or 10 large holes right down to the bottom of the cement floor and there were 3 on the south section in the rear; that Fairchild had these holes fixed; that they remained fixed for about 6 weeks; that the cement work looked as if it were full of sand; it crumbled off; that then they had to call a cement man in and have the work done themselves; that he knew the roof was leaking because you would have to have an

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umbrella to walk through.

H. E. Keagstedt testified on behalf of the defendants that he was a roofing contractor; that he saw the garage on the first of December, 1921; that he found the roof in a fairly leaky condition; that the north truss seemed to be in better condition than the south; that reseating was sufficient on the north bay; that the south bay needed an entirely new roof; that he found numerous leaks brought about mostly by wear and tear; that they were along the walls, the laths had given away from age and pulled away from the walls; that the main body of the roof had, through sub. rains and weather conditions, rotted, especially on the south bay; that the holes along the wall where the flashing occurs were not so big; that all you need to have is a hole big enough for a pinhead and water would seep through; that the lath is fastened on the side of the wall with nails, and in time the mortar in between the bricks will soften up, and naturally the nail has no grip to hold the lath, and pulls away from the brick wall and that lets the water in; that that is the condition he found there; that he made an inspection of the skylight; that the metal was rusted through and the putty around the glass was practically gone; that that condition existed over the whole skylight.

Counsel for the defendants contend that "The defendants are entitled to have reviewed on this appeal the refusal of the trial court to take the case from the jury at the close of the plaintiff's evidence;" that "The plaintiff failed to establish a prima facie case and the court should have directed a verdict at the close of plaintiff's evidence."

The defendants are not in a position to assign error on the court's refusal to take the case from the jury at the close of the plaintiff's evidence, as the defendants waived their right

• 1971 年 12 月 1 日

document will be listed on 2011/09/27 at page 1 of 2

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

11. The following information is for the year ended 31/12/2017:

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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5. *Other* _____

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These figures are based on the assumption that the total number of people in the world is 5 billion.

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The Committee will accept a bill by majority vote at 10:00 A.M. or after.

DATE: 10/10/1979

3. The following information is provided for the year ended 31/12/2014:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the mean of the distribution.

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to assign error by introducing evidence on behalf of the defendants. Ferrero v. Knights of Security, 309 Ill. 476, 478, 479; Harris v. Shabek, 151 Ill., 287, 293.

Counsel for the defendants further contend that the court should have directed a verdict in favor of the defendants at the close of all of the evidence. We do not think that the contention is correct.

Where there is legitimate evidence tending to prove a cause of action, a trial court has no power in a case tried before a jury to determine the weight and preponderance of conflicting evidence and direct a verdict in favor of the defendant.

Mirich v. Forschner Contracting Co., 312 Ill., 343, 355, 356.

In the case at bar we are of the opinion there is legitimate evidence tending to establish a cause of action.

Counsel for the defendants further contend that the statement of claim on its face shows that the defendant Henry P. Reger acted solely as agent for the defendant Mary P. Reger; that therefore, there is a misjoinder of parties; that although the question of non-joint liability was not put in issue by the affidavit of merits of the defendants, that fact does not prevent the defendants from attacking the joint judgment as the evidence shows affirmatively that the defendants are not jointly liable.

We are of the opinion that the evidence does not show affirmatively that the defendants are not jointly liable. The written agreement in regard to the repairs was set out in the plaintiff's statement of claim; the agreement was signed by "H. P. Reger" individually, and not as agent for Mary A. Reger; and there is sufficient evidence to show that the defendant, H. P. Reger, throughout the transaction in relation to the repairs, acted as an independent party and not as agent of Mary A. Reger.

We think that the verdict of the jury was not manifestly against the weight of the evidence and that the judgment of the trial court should be affirmed.

The rule is a familiar one, and has been repeatedly announced, "that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." Corney v. Shady, 295 Ill., 78, 83. It is also the rule that a verdict will not be disturbed merely because the evidence is doubtful. Illinois Central Railroad Co. v. Cowles, 32 Ill., 116, 121; DeForest v. Odey, 42 Ill., 500, 501.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

4658a

CHARLES W. PEINKE, etc.,
for use etc.,
Appellee,

vs.

LOGAN SQUARE TRUST AND
SAVINGS BANK (a corporation),
et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

238 I.A. 628³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit on a replevin bond given by appellant bank as principal and the other appellants as sureties. The judgment against them was for \$4,400 debt and \$2,584.48 damages.

The first count of the amended declaration set up the bringing of a replevin suit by defendants against the bailiff of the Municipal Court, the issuance of the writ, the execution of the bond containing the usual conditions, the replevy of the property, the failure to prosecute the suit with effect, and to comply with other conditions of the bond. The second count set up the same matters and a claim for attorneys fees as damages in defending the replevin suit.

A general demurrer to defendants amended second and third pleas was sustained, the other pleas being withdrawn. The case was submitted to the jury on evidence for plaintiff only.

The first amended plea alleged that plaintiff is not entitled to recover more than one cent damages, because the replevin suit was dismissed and the merits were not

determined in that action; that at the time of replevy the right of property in the goods was in one Smith and not in the plaintiff; that before the replevy the bailiff of the Municipal Court levied a writ of attachment in aid upon said goods in a certain suit against said Smith; that before the attachment suit or the replevin suit, said Smith conveyed said goods to said bank by chattel mortgage to secure a certain indebtedness to it, to the extent of \$2,066.45 and interest, which remained unpaid at the time of levying the replevin writ (which mortgage and notes secured thereby are set forth in hanc verba) and that said goods were replevied for the purpose of foreclosing said mortgage, that it has since been foreclosed, and the goods were sold for less than the amount of the debt, etc., to-wit: for \$2100.

The second amended plea sets up the same defense, omitting reference to the attachment suit.

Appellee attempts to justify the sustaining of the demurrer on various grounds, mostly of technical pleading. While appellee recognizes that in such a case, where the replevin suit is dismissed, the defendant has the right to plead and prove his title to the property in mitigation of damages as provided by statute, (Cahill's Stat., ch. 119, sec. 36) he contends that the pleas fail to allege title in the bank, and attempts to set up title in Smith, a stranger, as may be done in a plea to a replevin suit, but not to one on the bond, citing Hallam v. Calahan, 23 Ill. App. 524. But as said in that case, one may plead any qualified title of his own as well as a general title, and we think that is the effect of the pleas in this case.

Nor do we think the pleas are subject to the criticism of pleading evidence instead of ultimate facts,

or that they do not properly show that the merits of the replevin suit were not determined. They expressly aver the ultimate facts that the suit was dismissed and its merits were not determined, - the usual incident to the dismissal of a suit. A further detail of the proceedings was not necessary. The pleadings in cases cited by appellant on this point were quite different.

Because there was no traverse of the claim for attorneys fees, it is urged the pleas were defective as attempting to answer the whole declaration. The defendant was entitled to the statutory plea in mitigation of damages, the only material issue in such a case.

It is also contended that the mortgage set up in the pleas was void as to third persons, because it does not definitely show when the debt matured. We think it is a legitimate inference from its language, though it be somewhat indefinite, that the notes fell due, one each month for ten successive months after date of the mortgage, and the notes in evidence so show.

We think the court erred in sustaining the demurrer.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

[illegible]

29770

353 - 29770

4659a

AMERICAN TRAVEL and
HOTEL DIRECTORY CO.,
Inc.,

Appellee,

vs.

THOMAS MACK etc.,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 628⁴

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover for advertising in plaintiff's hotel directory. Defendant claimed he never made a contract for the same, and that his signature to what plaintiff relied on as a contract was procured by fraud.

The so-called contract was what might be defined as a combination questionnaire and service contract circular, which defendant filled out and signed, and mailed back to plaintiff, together with a letter which the court, over defendant's objection, refused to receive in evidence.

The letter reads as follows:

"Gentlemen:

As per your circular letter, we are returning herewith the listing of our products for free listing in your publication, and without charge to us.

We presume this is a free listing similar to" etc.

This letter, accompanying as it did the purported contract, was admissible as a part of the transaction, and it was error for the court to exclude it. It has a direct bearing on the issue whether there was a meeting of minds in a contract, regardless of the question of fraud. (22 C. J. ^{PP.} 803, 804.) It was in the nature of a counter proposal, inconsistent with

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1942 - 1943

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an unconditional acceptance of the terms of the circular form of contract.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

2000

Reprinted from *Journal of the American Medical Association*, 1972

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29828

4660a

411 - 29828

E. B. CALDWELL,
Appellant.

vs.

WILLIAM H. JOHNSON MFG. CO.,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

238 I.A. 629

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover rent for the month of December, 1922, under a lease to defendant of space in a building for defendant's factory, from April 1, 1920 to April 30, 1923. Defendant abandoned the premises in November, 1922, after having paid the rent for that month and previous months, and defended the suit on the ground of a constructive eviction for failure to furnish heat according to the terms of the lease.

By the terms of the lease the "lesser agreed to furnish during the normal business hours, excepting on Sundays and holidays, during the term of the lease, heat between October 1st and April 30th of each year and when required." The lease was assigned by the lesser to plaintiff in June, 1921.

Defendant took possession in March, 1920, and the record shows that its president repeatedly complained to plaintiff or his agent of insufficient heat from November, 1920, to May, 1922. He testified that at or about the latter date he notified plaintiff that if the heating conditions were not changed defendant would not stay in the premises, and that plaintiff then promised that just as soon as the heating season closed he would make changes and alterations necessary to furnish defendant with proper heat, that he failed to do so, and being informed in June, 1922, that no change would be made defendant began looking for other quarters.

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THE PROCEEDINGS OF THE BOARD

RELATIVE TO THE MATTER OF THE

This is a bill to amend the act of the 11th of January,

1882, under a clause in the act of the 11th of January,

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the act of the 11th of January, 1882, relating to the act of the 11th of January, 1882,

Plaintiff denied making such a promise. But the fact was one properly for the jury to determine. Assuming they found the promise was made, the fact becomes important on the question of waiver urged by appellant.

The point made is that evidence of the heating conditions during the heating season from March, 1920, to April, 1922, inclusive, was not competent to justify abandonment in November, 1922, because defendant by payment of rent and remaining in possession waived complaints made prior to the summer months of 1922, and is estopped from setting up such past causes of complaint in justification of the abandonment. The answer to the contention is found in the jury's evident acceptance of the fact of said promise and the failure to keep it. As said in Lowler v. McNamara, 203 Ill. App. 235;

"It is now well settled law that the failure of a landlord to furnish heat in an apartment in accordance with the terms of the lease, amounts to a constructive eviction, which justifies the tenant in abandoning the premises." (Citing cases.)

"While it is true that in certain cases the right to abandon premises must be exercised within a reasonable time, and may be waived by continued possession, yet it is also an established rule that the tenant does not lose the right to assert a constructive eviction by remaining in possession in reliance on the landlord's promises. (26 Corpus Juris, P. 263, 314; Mark v. Dillenkamp, 67 N. Y. Sup. 726; Lawrence v. Ketcher, 117 N. Y. Supp. 876.) As said in the last cited case:

"Where the tenant has been deprived, by the landlord, of the benefit and enjoyment of the premises, the defendant has a reasonable time after the creation of the condition to complain, and if the condition is not remedied, to vacate the premises. What is a reasonable time depends upon the circumstances of each case."

In the case at bar there was testimony of a promise to remedy conditions previously complained of, and that when defend-

ant learned in June, 1922, that the promised change was not to be made, it began looking for another place to which to move its factory and offices. There was uncontradicted testimony that it was not able to find a suitable place before October 1, 1922, where defendant could get proper space that would be available for occupancy, and that it would require from four to six months to search for such a place. Under such circumstances it was a question for the jury to determine (1) whether the promise to make a change was made, and (2) whether there was an unreasonable delay in vacating the premises after defendant learned that no change would be made, and (3) whether the acts of the landlord amounted to an eviction of the defendant (Eubens v. Hill, 213 Ill. 543; Barrett v. Bodie, 158 Ill. 479.) The jury apparently decided these questions in favor of defendant, and we are not disposed to disturb their conclusions, not being able to say that they were manifestly against the preponderance of the evidence, unless it can be said that there was reversible error in the court's rulings and instructions complained of.

Evidence was heard tending to show that the conditions complained of existed in March, 1920, the month before the rental period began, and continued to exist during the winter following the abandonment. While such evidence was perhaps not admissible, except so far as it might tend to show the insufficiency of the heating plant under like conditions, yet as the evidence was of the same character as that given of conditions during the tenancy, and was met by the same counter evidence, we are not disposed to regard the error as necessarily calling for a reversal.

Nor need we review the evidence as to its sufficiency on the question of the heating conditions, so long as we cannot say the verdict was against its preponderance, whether we regard or eliminate from consideration the immaterial testimony.

We find no reversible error in the instructions. The

The first question is whether the evidence is sufficient to establish the fact of the defendant's guilt. The second question is whether the evidence is sufficient to establish the fact of the defendant's innocence. The third question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The fourth question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The fifth question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The sixth question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The seventh question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The eighth question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The ninth question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence. The tenth question is whether the evidence is sufficient to establish the fact of the defendant's guilt or innocence.

judgment is therefore affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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432 - 29849

JEAN A. CANTHERIGHT,
Appellee.

vs.

EARLE K. BAKER,
Appellant.

4661a
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 629²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff in a suit on two promissory notes for \$2400 each made by defendant to plaintiff May 27, 1918, and due on or before December 31, 1919, and December 31, 1920, respectively.

Defendant pleaded payment and put in evidence twenty of his checks payable to plaintiff's order, which she endorsed and deposited in her bank account. The first check is dated June 2, 1919. The last while undated was paid on August 10, 1920. They aggregate \$5454.72, approximately the amount of principal and interest at six per cent as called for in the notes.

It was the claim of plaintiff that these checks were given to her to invest the proceeds as advised by defendant, the investments to be used to margin a speculative account with a stock brokerage firm. The account stood in her name. She claimed that it was his and he claimed that it was her's. He took care of the account and admitted placing \$2600 worth of Liberty bonds in it, which she had given to him and which she claimed were purchased from the proceeds of the checks on his advice. She also claimed to have invested \$2600 in Ree motor stock that was also put in the account. He claimed that

WILLIAM A. BUCHHEIT,
Plaintiff,

vs.

WILLIAM E. BUCHHEIT,
Defendant.

WILLIAM E. BUCHHEIT,
Plaintiff,

vs.

WILLIAM E. BUCHHEIT, PLAINTIFF,
vs.
WILLIAM A. BUCHHEIT, DEFENDANT.

This is an appeal from a judgment for plaintiff in a
case on two promissory notes for \$500 each, by defendant
to plaintiff May 17, 1915, and one on before December 15,
1917, and December 15, 1918, respectively.

Defendant pleaded payment and set in evidence twenty
of his checks payable to plaintiff's order, which the court
and deposited in her bank account. The first check is dated
June 2, 1915. The last check entered was paid on August 15,
1918. They represent \$500.00, respectively the amount of
principal and interest as the payee is called for in the
notes.

It was the claim of plaintiff that these checks
were given to her to invest the proceeds as advised by defendant,
and, the investments to be used to pay a speculative account
with a stock brokerage firm. The account stood in her name.
She claimed that it was his and he claimed that it was her's.
In each case of the account and advised plaintiff that money
of plaintiff's money is it, which she had given to him and which
the claims were purchased from the proceeds of the checks on
the advice. The also claimed he had invested money in the

he merely took care of the account for her, that he had put in \$5,000 of his own money and whatever securities she handed him for the purpose of protecting the account.

The facts depend largely upon the credibility of the two parties to the suit. Outside of their own statements there was little testimony to corroborate either, but much latitude for inferences. On the whole the evidence seems very unsatisfactory from either point of view, but we think there was error in the rejection of evidence that would have a tendency to support defendant's contention.

Plaintiff testified that defendant had given her another note for \$5,000 which had been "partially paid" and returned, and that defendant had given her checks other than those in question aggregating between \$3,000 and \$4,000. On her being asked whether or not there was any other indebtedness at the time the notes in question were given the court ruled that the question should be confined to "money relations." When asked what they were she expressed a disinclination to answer and the court finally refused to let her answer whether there were any moneys due her from defendant outside of these notes when they were given. Under the peculiar circumstances of the case we think the court should have permitted her to answer. Her vocation was that of a nurse and she made no proof of any business relations or transactions from which an indebtedness might arise and said she made no "serious" demand for payment of the notes until 1921.

It also appeared that she purchased from proceeds of the checks a certain amount of oil stock in the Johnson Oil Company, and that she admitted retaining possession of that stock as her own. Such contention was inconsistent with her testimony that all of said checks were intended for investment for defendant's benefit, yet the court erroneously, we think, did not permit her

at the end of the year, and the amount of the loan was \$100,000. The loan was made to the company for the purpose of financing the construction of the plant. The loan was made on the basis of the company's financial statement for the year 1954, which showed a net worth of \$100,000. The loan was made on the basis of the company's financial statement for the year 1954, which showed a net worth of \$100,000.

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no little testimony to the character of the man, but much to the character of the woman. On the whole the evidence seems very favorable.

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THE UNIVERSITY OF CHICAGO PRESS

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James "Applite" McLean and his wife, John McLean, are the only ones who have been

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to answer how many shares of that stock she had. The retention of oil stock purchased from the proceeds of the checks had a tendency to show that some of them at least were not intended to be used for defendant's benefit and inferentially were to be applied on said notes if there was no other indebtedness, unless they were intended as a gift, which was not claimed.

Defendant sought to go into plaintiff's method of living and her income at the time the notes were given and objections being sustained, he claimed and offered to prove that she was not working at the time; that she had no money of her own; that the money from these checks was in payment of the notes and used by plaintiff for her living and personal expenses. The court excluded the offer of such testimony, which we think was competent.

The checks were approximately the amount of principal and interest due on the notes. They were accompanied by letters that were not produced. They were deposited in her own bank account. Neither the pass-books nor checks of the account nor the bank books were brought forward to throw additional light on the controversy.

While plaintiff denied the brokerage account was her's, she made no explanation of the disposition of a check from the brokerage firm to her order for \$1242.15 which closed the account. This check was endorsed in her name, deposited in the bank in which she kept her account and paid through the Chicago Clearing House, December 11, 1920, three months after she cashed defendant's final check. If the account belonged to defendant the check belonged to him and seemingly in view of the controverted facts some explanation of this check which went into her account should be made, especially as she denied ever receiving any money from the brokerage firm.

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owed by Elizabeth for her living and personal expenses. The
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The results were approximately the same as obtained in the first trial. They were accompanied by a large amount of gas. They were deposited in the same manner as the first trial. They were deposited in the same manner as the first trial.

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She produced no data to show, nor was she able to say, to what she applied any particular check. We are not impressed with her explanation as to what the money from the checks were to be used for. As defendant was a business man and personally attended to the account, it is difficult to understand why, if it was his, he should not himself have purchased the securities to protect it instead of having her make the purchases for him and then turn the securities over to him to be placed in the account.

In view of these and many other unexplained features of the case and the direct contradictions as to main facts, we think it was error for the court not ~~XXXXXXXXXX~~ to permit inquiry into how much oil stock was purchased from the proceeds of the checks which she retained, and to refuse defendant's offer to show that the proceeds of the notes were used for her own living expenses. For these errors, if no others, the judgment must be reversed and the cause remanded.

While we do not think there was proper proof made on which to receive the ledger sheets of the brokerage firm, we fail to see that they had any direct bearing on the question of the ownership of the account.

Appellee has made certain points as to sufficiency of the abstract which we deem extremely technical and of no importance.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

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all to see that they had any direct bearing on the question of

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4. UNCLASSIFIED FOR DISSEMINATION

29860
443 - 29860

CHARLES COON et al.,
Appellees,

vs.

MORRIS G. LEVINSON,
Appellant.

4662a
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

238 I.A. 629³

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to foreclose a trust deed, from defendant Levinson to one Martin, as trustee, to secure a part of the purchase price of the property deeded by the latter to the former. It is dated December 15, 1922. The No. 1 coupon interest note for \$150 fell due June 15, 1923. Because of alleged default to pay the same, this suit was begun August 1, 1923, as the terms of the deed provide may be done.

Defendant Levinson's answer denied that Charles Coon and Gertrude Coon were the legal owners and holders of the deed and notes so secured, and that there was any default in the payment of said coupon note, alleging an oral agreement by Martin at the time of closing the transaction of purchase to discharge said note and hold the same until discharged.

Complainant's evidence to the effect that said Charles and Gertrude Coon were the holders and owners of the deed and notes was not controverted by any direct evidence, and the mere suspicion cast upon such claim is not such as would warrant our disagreeing with the finding of both the master and chancellor as to that fact. And if they were the holders and owners of the deed and notes, then we fail to see

how such a promise by Martin, if made, can be availed of as a defense against them as bona fide holders of the negotiable notes, even though purchased after said coupon fell due, there being no pretense that the Coens, or either of them, had knowledge of any such promise.

It was claimed by defendant Levinson that at the time of closing the transaction, certain special assessments for \$171.40 were not deducted from the purchase price as provided in the contract, but that Martin was "permitted to withhold" the sum of \$171.40 for such special assessments, and that defendant did not deduct same as provided in the contract because Martin was to discharge the interest note for \$150 and credit the balance of the \$171.40 on No. 2 interest note, and that Martin promised to hold said coupon notes until so discharged.

While Martin denied making any such promise or arrangement and both the master and chancellor found that the \$171.40 was actually deducted from the purchase price, yet the oral arrangements, whatever they were, must be deemed to have merged into the written instruments whereby all agreements were consummated.

We have carefully reviewed and analyzed the evidence with respect to the claim that the findings were against the weight of the evidence, and do not agree with that contention. It is not a case where there was uncontradicted testimony regarding the ultimate facts, but one where there was contradictory testimony, in which case much weight is given to the findings of the chancellor, who saw and heard the witnesses. (Kelly v. Jones, 290 Ill. 375.)

While it is true, as appellant contends, that positive testimony is entitled to greater weight than negative, yet

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positive denials as there were in this case, of what is affirmatively testified to as a fact or occurrence, is affirmative and not negative evidence in the sense of such proposition. (Frisell v. Cole, 42 Ill. 362.) The principle invoked is not applicable to this record.

Nor does the fact that mere opinion evidence of an expert on handwriting was not met by counter testimony of other experts, justify the contention that such testimony was disregarded, when there was positive testimony against the conclusion of such expert. Besides the weight of such evidence was for both the master and chancellor. The opinion of an expert on disputed handwriting is not infallible.

We find no ^{good} reason for reversing the decree. It is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

S. GOLDENBERG,
Appellee.

vs.

SCHEIFF SAFETY DEPOSIT CO.,
a corporation,
Appellant.

4663a

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 629^H

MR. PRESIDING JUSTICE BARRETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff rented a safety deposit box from defendant in 1910. For failure to keep up his payments for the same defendant opened the box in July, 1920, and removed the contents, as it had a right to do under the contract of bailment. A careful examination at that time by defendant's president and secretary and the vault custodian, revealed as the only contents, according to their testimony, three printed abstracts, miscellaneous papers of no value, and a horse-shoe pin of no intrinsic value, which they testified were sealed in an envelope and put in a locked compartment in defendant's vault. Plaintiff called at defendant's place of business January 21, 1922, for the first time since making his last payment in June, 1918, and was told of these facts. But defendant could not at that time find the envelope. Later after this suit was begun on the theory of defendant's negligence, defendant found the envelope, mislaid, as claimed by its officers, under a wrong date, but sealed and in the same condition as when filed away.

Plaintiff claimed he had placed \$750 in cash in between the leaves of the abstracts. Defendant's said officers testified to a careful examination and that no money was found when the box was opened, and to the condition of the contents

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them and afterwards.

It is urged on this appeal that the verdict for plaintiff for said amount is manifestly against the preponderance of the evidence; that his statement as to the money is not only uncorroborated, but inconsistent with his conduct and statements, and that the testimony of defendant's three officers that no money was found on opening the box, and examining its contents, and that defendant had no key to the box and was obliged to open it with a drill, and that the envelope remained sealed up to that time, and was accessible to none except the company's officers until produced in court, established by manifest preponderance that there was no money in the box when it was opened, and showed that there was no proof of negligence, unless in misplacing the envelope - for which no such damages could be claimed - and hence no damages were shown, and no loss unless the money was stolen by said officers, a more or less unwarrantable inference.

While we think there is much force to this contention, we shall not review or discuss the relative weight of the evidence, because we think there was error in the refusal of the court to instruct the jury at defendant's request that only reasonable care was to be exercised by such a bailee, and the giving of an instruction which told the jury in effect that the payment of back rent by plaintiff in January, 1922, renewed "plaintiff's rights" under the contract and it was for them to say "what the rights were and what obligations were imposed on the respective parties." The jury were thus given wide range to find the law of the case as they pleased. Of course the construction of the contract was for the court and not the jury, which, with such latitude as the instruction gave, may have regarded defendant as an insurer instead of a bailee who is bound to exercise only reasonable care. (Reumen v. Nat'l. Safe

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Deposit Co., 124 Ill. App. 419; Shannon v. Temple Safety Dep.
Vaults et al., 189 Ill. App. 316.)

Not only do we think there was reversible error in these respects but the motion for a new trial should have been granted because of the intemperate and prejudicial argument of plaintiff's counsel to the jury, in emphasizing that they were in a "peer man's court" and that his client was "peer" and "defendants' wealthy bankers." Considering the frailty of plaintiff's uncorroborated testimony, and the character of the case, these remarks were unquestionably so prejudicial as to call for a reversal, regardless of any other ground therefor.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL., U.S.A.

Vol. 21, No. 1, Jan. 1, 1928

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL., U.S.A.

Subscription and Advertising Information

Subscription and Advertising Information

457 - 22874

GEORGE B. CHAPMAN,
Appellee,

vs.

FRED FULLER et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 629⁵

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This suit was brought on the theory of a liability of defendants under a contract for exchange of properties with plaintiff to pay the latter the cost of paving the street in front of a lot received by plaintiff in the exchange. A judgment for \$300 was entered on the finding of the court for plaintiff.

Various errors are assigned. But if for no other reason there must be a reversal because there was a joint judgment without proof of a joint liability. The record does not disclose any proof of liability on the part of Florence May Fuller. This is practically conceded by the claim of appellee that the suit was dismissed as to her. But the record discloses no such action. It is needless therefore for us to review the evidence as to its weight, another trial being necessary.

As to the claim that the statement of claim is insufficient, and the court was without jurisdiction to try the case on an order transferring the same from the second to the first district of the Municipal Court, it is enough to say that the points were not duly preserved for review.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

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10-10-1964

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The points were not numbered in sequence.

Also checked at the Municipal Court. As it seemed to say that there was no other forwarding the case from the court to the District, and the court was without jurisdiction to try the case as the claim that the statement of White is false.

29883
466 - 29883

4665a

ANNA BERKMAN,
Appellee,

vs.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MORRIS ZEIDMAN et al.,
Appellants.

238 I.A. 630

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover money claimed to be due plaintiff as a commission for procuring a purchaser of defendants' real estate. Defendants denied making any agreement to pay a commission, or for services, and that plaintiff secured a purchaser for the property or performed any services in connection with the sale. There was a judgment for \$307.50 on a finding of the court for plaintiff.

Mrs. Berkman was a mere acquaintance of the Zeidmans, and not a real estate broker. She testified that defendants asked if she would be able to sell their house, that she went to see Mrs. Blank about it, who subsequently purchased the house for \$10,500, and that after the sale Mrs. Zeidman promised to give her a commission. She did not claim that she was to procure a purchaser at any particular price, or that there was an agreement for any rate of commission, or how much would be given as a commission, or that there was any conversation in regard to real estate board commissions. She never introduced the parties or was present at any conferences between them, and in fact did nothing but inform Mrs. Blank that she had a house for her and showed her the house.

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Even if the proof can be said to show she was the procuring cause of the sale, and even though, as an unlicensed real estate broker she may recover for a single transaction, yet in the absence of any agreement for a specific rate or sum for her services or for a commission usually charged by brokers, and even of any proof of the reasonable value of her services or of what were the usual and regular broker's commissions there was no basis for the court's finding and judgment.

While a witness for plaintiff testified that he was familiar with the customary and usual brokerage fees and charges for the sale of real estate, even were it material he did not testify what they were.

We are asked not only to reverse but find as facts that there was no contract and plaintiff was not the procuring cause of the sale. We are not disposed to say that there was such a preponderance of evidence as warrants such a finding. Had defendants renewed their motion at the close of all the evidence to find for defendants as a matter of law for failure to prove any specific sum as due, and it had then been denied we would not remand. But in the state of the record the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

There is the great one in which the one who is
 coming out of the side, and even though he is
 not alone, he is not alone for a single moment.
 It is in the course of my journey that I find
 that there is a great one in which the one who is
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 It is in the course of my journey that I find
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THE ABOVE IS ONLY FOR INFORMATION AND NOT TO BE USED FOR ANY OTHER PURPOSE

These findings are consistent with the idea that the brain is not a simple machine, but a complex system that can adapt and change in response to its environment.

100-443887-100

and, finally, a firm strategy as narrative is developed.

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Group of students not used to perform a standardized test.

Some of the most important work in the field of the history of the United States has been done by the people of the United States.

The President will be able to do it.

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4666a

499 - 29916

ETHEL M. COPELAND,
Appellee.

vs.

JOHN E. MAY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

238 I.A. 630²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This cause of action is predicated upon the claim that plaintiff through appellant May employed his firm, which was engaged in a stock and bond business under the name of Curtis & Sanger, to invest her moneys and securities, and that they wrongfully refused, after demand therefor, to return the securities she had given to them, and such other securities as were purchased with her money or with the proceeds from sales of her securities.

The plea of general issue was filed by said May, the only defendant served with process, who appeals from a judgment entered upon a verdict against him for \$4500.

The dealings out of which the controversy arises originated in a conversation had between plaintiff and defendant May in the fall of 1916, pursuant to which she handed him for "investment," as she claims, a check for \$1000, received from the estate of her father, with which defendants opened a speculative account in her name, which for a time gave her a profit and in the end a debit to the firm of several thousand dollars. At a later date she handed him other moneys and also securities inherited from her mother, which had been entrusted to her brother-in-law in Boston for investment.

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The conversations with respect to these matters were had between her and May alone. He was her second cousin and their families were intimate. Having full confidence in him because of such relationship and his business experience in financial matters, and wishing to make more money than she was getting from her securities while in the hands of her brother-in-law, she consulted May and gave him these moneys and securities solely for investment, as she claims, and without authority to use them in speculation.

While May did not undertake to testify that she expressly authorized speculation for her account he claimed that she never used the word "invest" or "investment," but as he remembered it said she "had some money coming in and wanted to turn it over and make some money," and thereupon he opened up a speculative account with the thousand dollars, purchasing, as shown by a statement sent to her, certain shares of stock at a cost of over \$9,000. Like purchases or sale were made from time to time for a period of over four years during which she received printed notices thereof and statements at the end of each month showing the debit or credit balance.

It was the contention of appellant that whether or not she expressly or impliedly authorized these speculations the fact that she received these statements and made no complaint about them constituted a ratification of the speculative account, and that a statement submitted for her approval in 1921, showing a balance to her debit of over \$20,000, in which was enumerated the stocks then carried for her and which was returned signed by her, constituted a stated account. It was also appellant's claim that the firm had a lien on these securities received and carried for her account, which would hardly be questioned as to the speculative securities, if the speculations were authorized.

[illegible]

On the other hand, it is the contention of appellee that she neither authorized speculative transactions with her moneys and securities nor knew that her dealings with defendant were of that character. The case, therefore, reduces itself to the question of fact whether or not her knowledge or understanding of the transactions was such that authority to enter into them would be implied, if not expressly given, or whether they were ratified.

It is a general rule that a party will not be deemed to have ratified an unauthorized act of an agent unless he does so with full knowledge of all the facts. (Gill v. Fatz, 230 Ill. 39, 49.) The question of her knowledge of these transactions, therefore, was a vital question for the jury's consideration. Without such knowledge or understanding there could be no ratification, and if she was ignorant of the facts, without independent means of verifying them, and depended on May or his firm for her information, the jury might well find that there was not a stated account. When she was finally asked for money to protect the account against large losses resulting from speculation, she ^{was} surprised at the information and sought the advice of legal counsel.

Her claim was made up of \$2000 in cash, and \$2300 from the sale of securities delivered to the firm, together with dividends and interest that had accrued, amounting approximately to the jury's verdict, and also of a claim for \$12,000 which the jury may have classified as belonging to the speculative account. They may also have regarded these first three items as separate and distinct transactions independent of the purely speculative transactions. If the jury might reasonably find from the evidence that she did not authorize the speculative transactions nor have such knowledge or understanding of them as would warrant the inference of ratification, but with con-

on the other hand, it is the contention of the
that the subject's knowledge of the facts is not
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of the subject's knowledge of the facts is not
the question of fact whether or not the subject's
knowledge of the facts is not the subject's
to them would be helpful, it is not necessary
to have a trial.

It is a general rule that a party will not be bound
have a right to a trial of an issue unless he has
with full knowledge of all the facts. (See, e.g.,
1. 28, 19.) The question of the subject's
knowledge, however, is a vital question for the party's
knowledge. Without such knowledge as to the subject's
and he is not a party. But it is not enough to be a party.
that independent means of verifying facts, and dependent on
it at this time for information. The party must be able
of facts and a stated account. Then the party must be able
to money to protect the account against large losses resulting
a question. The subject of the information and account
a review of legal counsel.

But claim was made of the fact in 1911, and from 1911
a rule of procedure applied to the fact, and from 1911
rights and interests that had occurred, amounting approximately
the party's interest, and also of a claim for \$11,000 which
a party may have claimed as belonging to the party's
account. They may also have regular bills from these firms
against the party's interest. It is the party's responsibility
on the evidence that the party's interest in the party's

fidence and trust in her cousin and his business experience handed him her moneys and securities to "invest" or "turn over," intending and expecting him to make "investments" for her as that term is commonly understood, (See. 2 Words and Phrases, 2nd Series, 1159) and supposed that that was what he was doing when she received statements of the account, then we should not disturb the verdict. On the other hand, if the weight of the evidence is so manifestly against that theory that the verdict cannot stand, we should reverse the judgment.

Neither side questions the principles of law relied upon by the other, but each contends that the authorities cited by the other are not applicable to the facts of the case. The case, therefore, resolves itself into whether we should disturb the verdict, which it is well settled we should not do on mere questions of fact where we can not say the verdict is manifestly against the weight of the evidence, even though we might have reached a different conclusion.

After carefully reviewing the evidence in which sharp issues of fact are raised between the two principal witnesses, Mrs. Copeland on one side and defendant May on the other, between whom alone were the conversations embodying the original agreement, we feel that much depended upon the view the jury took of the candor, sincerity and credibility of plaintiff in her statements to the effect that she had been brought up and lived in entire ignorance of business methods and financial matters and without any responsibility in connection with them and entrusted her interests in such matters entirely to others. Evidently the jury believed that when she withdrew her securities from her brother-in-law and placed them in the hands of her cousin she left them absolutely to his management and judgment without feeling it necessary to inquire into transactions with the nature of which she was wholly unacquainted and uninformed. It must also be borne

in mind that the jury had a decided and recognized advantage over this court in seeing and hearing the witnesses.

It appears that Mrs. Copeland attended private schools for young ladies here and in the east up to the time she was about seventeen; that in none of them did she receive instructions with regard to bookkeeping or investment of moneys or stock transactions. She had been brought up in entire ignorance of business methods and financial matters. The funds she inherited had been entrusted to others to take care of. Her income from them was small and desiring to get a better income she sought the advice of her counsel as aforesaid. He encouraged her to believe that he could do better with her funds and thereupon she entrusted them to him for investment, there being no pretense that there was any talk of speculation before she handed them to him. The most difficult part of her testimony to understand is why she gave so little attention to the statements of her account and the documents she was asked to sign. The jury, however, may have taken knowledge of the fact that such ignorance of business matters and indifference to their details are not unusual among women who are not obliged or accustomed to acquaint themselves therewith, especially where they have complete trust and confidence in the integrity and superior knowledge of those with whom they entrust the management of their affairs.

If we can not say that the jury were not justified from the evidence in taking this view of the case there is little use in our discussing in detail the evidence tending to prove her knowledge of these transactions or in dilating upon the probabilities or improbabilities of the case. We admit there is much room for differences of opinion. But believing that the jury could consistently find much in the circumstances and evidence to justify their conclusion as to appellant's liability we do not feel warranted in disturbing the verdict. Accordingly we shall affirm the judgment.

AFFIRMED.

Gridley and Fitch, JJ., concur.

The first of these is the fact that the Commission has been
 established in a very unusual manner. It was not created by
 an Act of Congress, but by a joint resolution of the Senate
 and House of Representatives. This is a departure from the
 usual practice of creating such commissions by Act of
 Congress. The second fact is that the Commission is
 composed of members from both the Executive and
 Legislative branches of the Government. This is also
 unusual, as commissions are usually composed of members
 from only one branch. The third fact is that the
 Commission is given the authority to investigate and
 report on a wide range of subjects, including the
 administration of the Government, the conduct of the
 war, and the relations of the United States to other
 countries. This is a broad mandate, and it is
 unusual for a commission to be given such a wide
 range of authority. The fourth fact is that the
 Commission is given the authority to hold hearings and
 to take testimony. This is also unusual, as
 commissions are usually given the authority to
 investigate and report, but not to hold hearings
 and take testimony. The fifth fact is that the
 Commission is given the authority to make
 recommendations to the President. This is also
 unusual, as commissions are usually given the
 authority to report to the President, but not to
 make recommendations. The sixth fact is that the
 Commission is given the authority to make
 recommendations to the Congress. This is also
 unusual, as commissions are usually given the
 authority to report to the Congress, but not to
 make recommendations. The seventh fact is that the
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 recommendations to the public. This is also
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 authority to report to the public, but not to
 make recommendations. The eighth fact is that the
 Commission is given the authority to make
 recommendations to the courts. This is also
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 authority to report to the courts, but not to
 make recommendations. The ninth fact is that the
 Commission is given the authority to make
 recommendations to the people. This is also
 unusual, as commissions are usually given the
 authority to report to the people, but not to
 make recommendations. The tenth fact is that the
 Commission is given the authority to make
 recommendations to the world. This is also
 unusual, as commissions are usually given the
 authority to report to the world, but not to
 make recommendations.

4667a

115 - 29923

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

ADOLPH HUSE,
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

238 I.A. 630³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The information in this case, upon which plaintiff in error was convicted, is fatally defective in the same respects as the information in case Gen. No. 29443, People of the State of Illinois v. Max Nasor, (in which an opinion of this court was filed July 14, 1925), in that it merely charges possession of intoxicating liquors without having a permit and does not negative the facts and circumstances under which possession without a permit may be lawful, as, for instance, as provided in Sec. 40 of the Illinois Prohibition Act.

What was said in that opinion is also applicable to the information in this case, and accordingly the judgment must be reversed because of the insufficiency of the information to sustain a judgment.

REVERSED.

Gridley and Fitch, JJ., concur.

4668a

FRANK STURTEVANT, doing business
as Sturtevant Orchestra of
Chicago,

Appellant,

vs.

FRED C. DAHMS,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 630⁴

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This suit is for a breach of contract on the part of defendant in refusing to accept the services of plaintiff pursuant to a written contract whereby the latter was engaged by the former to furnish music for a dance. Defendant admitted the terms of the written contract, but pleaded that it was obtained by fraud and misrepresentation. Appellant urges that there was no evidence tending to establish the defense, and if it can be said to have such tendency, the proof is insufficient to support it.

The claim of fraud and misrepresentation rests wholly upon defendant's evidence of a conversation with the plaintiff preliminary to signing the contract, in which he asked plaintiff "are you a member of the Chicago Federation of Musicians?" to which he replied "I belong to the right one and I will give you good music."

Plaintiff denied having such a conversation. But whether he had it or not, it can not be deemed sufficient to sustain the affirmative defense. Defendant canceled the contract on learning that plaintiff was not a member of the Chicago Federation of Musicians. But if defendant was unwilling to engage one not a member of that federation, the manifest evasive and indefinite answer to his alleged direct inquiry was certainly such as would

put one of ordinary vigilance and attention upon his guard, and having neglected to avail himself of the warning it gave, he could not afterwards be heard to complain. (Billman v. Madelheffer, 119 Ill. 567, 577; Hoeting v. Wight, 72 Ill. 390. Assuming the answer amounted to a false representation - though it can hardly be so regarded - yet if a party with knowledge equally available to both parties, instead of resorting to it trusts the other, the law as a general rule will not relieve him from his own want of ordinary prudence. (Hicks v. Stevens, 121 Ill. 186.)

The court should have granted a new trial. There were other errors, but they may not arise again.

REVEREND AND RESPECTED,

Gridley and Fitch, JJ., concur.

1. The first of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. This fact alone is sufficient to establish that the defendant is a person who is subject to the provisions of the Criminal Code of the State of New York.

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4669u

A. L. WILLIAMS,
Defendant in Error,

vs.

YELLOW CAB COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 630⁵

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages to plaintiff's automobile, which he claims was run into by one of defendant's Yellow cabs while it was standing beside the curb on the west side of Michigan avenue, Chicago. The statement of claim also alleged that the act was wantonly and wilfully done. The affidavit of merits put the material allegations at issue, and denied ownership or operation or control of the taxicab in question.

Several points are urged as grounds for reversal.

One point is a failure to prove defendant's ownership of the cab. There was evidence that the cab corresponded in type to that used by defendant, and a witness of the accident said its license number was 300147. Whatever the weakness of the evidence on this subject at the close of plaintiff's case, when defendant moved for a directed verdict, it was removed by the testimony of a taxicab driver for defendant who admitted he drove a car for it on the day of the accident and that it had that license number. While he denied having any accident, undisputed proof of a collision as alleged with a car bearing that license number and answering a description of one of defend-

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2. The following information is being furnished to you for your information:

1. The first of these is the fact that the Government of the United States has been unable to obtain any information from the Government of the United Kingdom regarding the activities of the British Intelligence Service in the United States.

207. Auch möglich bei Verdacht von der sehr feinen Regel

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1947-1948 was a difficult year for the U.S. Navy, and the Navy's budget was cut by 10%.

ant's care was sufficient to support the claim of liability. Any defect in plaintiff's proof on that subject was supplied by defendant's proof, the presentation of which waived any error in not instructing a verdict for defendant at the close of plaintiff's case. (Golf Co. v. Refrigerator Co., 252 Ill. 491, 501.)

It is also urged that plaintiff did not sustain the burden of proving the condition of his car immediately before the accident. He gave evidence of its condition the morning of the day of the accident, and the repairs, the cost of which he includes as damages, were of conditions testified to by eye observers as the direct result of the accident seen and described by them.

But we think the sum assessed as damages, namely, two hundred and fifty dollars was excessive. There was proof of damage to the fender, the hub caps, the running board moulding, the rear wheel, and axle, and for lining up the rear wheels, and installing new parts, including labor, to the amount of \$81.75. Included in the bill for repairing was \$125 for "burning off the cowl and repairing the entire car," for the necessity of doing which, as a result of the accident, there was not adequate proof.

But with that item included the verdict is still too large and may be accounted for by allowing punitive damages on the charge of wanton and wilful injury, which the jury were asked to impose. The only evidence on which the claim therefor could rest was that of unreasonable and excessive speed. In cases where the violation of a city ordinance by running at too great a rate of speed was relied on to show wanton and wilful negligence, it has been held that such a fact is not evidence of wilfulness. (I.R. R.R.Co. v. Hetherington, 83 Ill. 310; Blanchard v. L.S.&W.S. R.R.Co., 126 Ill. 416); and it has been held that a private corporation can not be liable for punitive damages merely for gross negligence

of its servants, unless it knowingly retains in its employ drunken or reckless servants. (I.C.C.Co. v. Hammer, 72 Ill. 347, 353.)

There was no charge or proof of the employment of a reckless driver by defendant, or of facts or circumstances under which the speed of the car itself could be said to constitute a reckless or wanton disregard for the safety of others.

Complaint is made of plaintiff's remarks to the jury, he having tried his own case. Some of them were improper and so ruled to be by the court. We do not think, however, they would account for the excessive verdict.

If plaintiff will remit down to \$81.75 within ten days herefrom the judgment for that amount will be affirmed, otherwise reversed and the cause will be remanded.

AFFIRMED ON REMITTITUR.

Bridley and Fitch, JJ., concur.

the evidence, which is hereby referred to the jury.

(The evidence is hereby referred to the jury.)

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181 - 30033

FASHION AUTOMOBILE STATION,
(a corporation).

Appellee.

vs.

LIONEL A. SHERWIN.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 631'

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover for storage of defendant's automobile for the months from October, 1921, to April, 1922, inclusive, and for items of labor, material and repairs. Defendant denied any indebtedness and claimed a set-off of \$150, as the agreed price for the sale of his automobile to plaintiff. The case was tried before the court without a jury, resulting in a finding and judgment for \$135, for plaintiff, from which defendant has appealed.

This was the second trial. On an appeal from a like judgment at a former trial presenting the same issues, this court on March 11, 1924, in case Gen. No. 28736, reversed the judgment and remanded the cause because of unsatisfactory proof to support either the claim or the set-off. Not only is the proof that was presented at the second trial equally unsatisfactory, but the numerous errors of the court in its rulings require the same order on this appeal.

The real issues of fact were, as stated in our former opinion, whether there should be any charge for storage during the months of March and April, 1922, and for eight days or more in October, 1921. It is fundamental that each party is required to establish his affirmative claim by a preponderance of evidence.

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238 I.A. 631

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This is a bill to recover for services of defendant's
attorney for the months from January, 1921, to April, 1921.
Defendant, and for issue of labor, material and repairs.
Defendant denied any indebtedness and claimed a set-off of
\$100, on the ground given for the sale of the automobile to
plaintiff. The same was paid before the court without a jury.
Finding in a finding and judgment for \$112, for plaintiff,
on which defendant has appealed.

This was the second trial. On an appeal from a first
trial of a former trial presenting the same issues, the
court on March 11, 1921, in case No. 10,750, reversed the
finding and remanded the cause because of immateriality of
evidence offered the state at the set-off. The only issue
was that was presented at the second trial specially
verdict. But the numerous errors of the court in its ruling
justify the same order on this appeal.

The trial issues at last were, as stated in our former
opinion, whether there should be any charge for storage during
the months of March and April, 1921, and for what time or more
or less. It is fundamental that each party is bound

FASHION AUTOMOBILE STATION,
(a corporation).

Appellee.

vs.

LIONEL A. SHERWIN.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

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The real issues of fact were, as stated in our former opinion, whether there should be any charge for storage during the months of March and April, 1922, and for eight days or more in October, 1921. It is fundamental that each party is required to establish his affirmative claim by a preponderance of evidence.

The court admitted incompetent evidence to establish that of plaintiff and excluded competent and material evidence offered by defendant.

Plaintiff's president, Salvat, testified to an agreement for storage at \$50 per month. But it is clear from his testimony that he had no personal knowledge of the precise time or number of days in each month when the car was in storage.

One of the issues was whether there was any allowance to be made when the car was not actually in the garage or storage, it having been removed to another place for restoring its batteries. The credit manager of plaintiff testified that deductions are never made when a car is out part of a month. It nevertheless appeared from a copy of plaintiff's ledger page, which the court against defendant's objection erroneously received in evidence without proof of an adequate foundation for the admission of secondary evidence, that plaintiff did give defendant credit against apparently storage charges of \$50 a month, in the months of November and February, and that the court erroneously refused to let defendant cross examine said manager with respect to said items after receiving the said copy of the ledger in evidence.

It also appeared that defendant gave a check dated Jan. 3, 1922, for \$107.35 (with which he was credited on the said copy of the ledger sheet as of December 31, 1921) which exactly covers all charges against him for the months of October, November and December, except the storage charge of \$50 for October. On the check in defendant's handwriting are the words: "Oct. month storage not included - open for adjustment. This pays Nov. and Dec. also charges." Defendant says they were on the check when delivered, and placed there pursuant to a conversation had with said manager respecting a dispute as to storage for more than 7

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days in October. Said manager admitted having a conversation as to leaving open the matter in dispute for adjustment. While testimony to that effect was finally given the court erroneously ruled that it was incompetent.

Defendant also sought on cross examination to show by the witness producing said copy of the ledger sheet, that the original documents from which the entries were made in the ledger were in existence, but was not permitted to do so. The witness afterwards, however, said the entries were made from time cards and charge sheets prepared by other persons and with which he had nothing to do.

The witness was also permitted to produce as copies of statements of each month's account, claimed to have been mailed to defendant, copies of entries that he said were taken from monthly charge sheets. The originals were not produced or called for and the copies were received over objection without adequate proof even that any such statements were sent to defendant.

At the close of plaintiff's case defendant moved to strike said copy of the ledger entries and said copies of alleged monthly statements. The court denied the motion. While defendant did not also rest his case at that time and thus avail himself of plaintiff's failure to prove its case by competent testimony, yet these defects were not cured by any subsequent testimony.

There were also erroneous exclusions of evidence bearing on defendant's claim of set-off.

About June 1, 1922, as defendant and a witness then with him, testified, defendant hailed Salvat on the street at a certain place, and conversed with him respecting plaintiff's liability for damaging defendant's batteries, - and plaintiff then and there agreed by way of adjusting all differences between them to buy defendant's automobile for \$150, and to send for the car which was then at another

garage, a written order on which defendant agreed to send at once to plaintiff. The conversation to that effect was corroborated by a witness who was with him at the time.

Defendant said he wrote and duly mailed the order the same day and subsequently other letters pertaining to the matter, asking why the car had not been taken from the garage, or why the check therefor had not been sent. He offered notices to produce the originals of said letters, the receipt of which was not denied, and then carbon copies of the original letters, to all of which the court sustained objection apparently on the ground that they were not replied to.

Salvat on rebuttal recalled meeting defendant at the time and place of said conversation but said nothing was said at that time about selling the car to him, but that there was such conversation later and he merely said "why should I buy the car. It is only worth \$5," but that he afterwards sent for it and the garage people refused to give it up.

Defendant put in evidence the record of the other trial which showed that Salvat then testified that he met defendant at the time and place claimed by defendant, and that defendant offered to sell his car and Salvat said he would send for it, and did send for it but didn't get it.

There was a sharp issue as to whether any such agreement on which defendant based his claim of set-off was ever made. The merits of that claim can not be passed on in the present shape of the record. But in view of evidence by defendant and his witness of such an agreement and a denial thereof by plaintiff, though admitting there was a conversation relating thereto, we think the court erred in refusing to receive not only the letter giving the order for the delivery of the car, but the subsequent correspondence. The first letter offered was admissible as showing that defendant

furnished the order for the delivery of the car as agreed upon according to his version of the contract, and thus fully performed his part of the agreement. While the subsequent correspondence so far as it set forth defendant's understanding of the agreement constituted declarations in his own favor, which otherwise would not be admissible, yet as they also demanded fulfillment of the alleged agreement, they tended to confirm his version of the admitted conversation until otherwise explained.

We do not think the letters should have been excluded on the ground that there was no reply to them. That fact might tend to support defendant's construction of the agreement, if no ground for ignoring them was shown.

As in case of the record of the former trial, the record will not permit either an affirmance of the judgment or entry of a different judgment here. Accordingly the judgment will be reversed and the cause again remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

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...his part of the agreement. While the agreement

...as far as it is not for the defendant's understanding

...the agreement constituted consideration in his own favor,

...the contract would not be enforceable, yet as they also de-

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...the ground that there was no reply in time. That fact might

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...entry as a different payment here. Accordingly the judge

...it still be reversed and the cause again remanded.

Reversed and remanded.

...and the case is remanded.

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208 - 30061

ANNA L. DENVER,
Appellee.

vs.

WILLIAM P. BRENNAN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 631²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant managed an apartment for appellee from about February 4th to May 4th, 1923, when his services were discontinued. He rendered his account claiming with other credits not questioned, \$51.20 for advertising, and \$465.45 for "commissions on spring leases" showing a debit balance in appellee's favor of \$251.60, which he claims to have tendered. The appeal is from a judgment entered on a verdict for \$802.45 in plaintiff's favor, which includes said items, said balance and a conceded sum of \$28.20.

The controversy, as finally limited, was over these two credit items, the solution of which depended upon what was the contract.

The contract rested in conversations had between plaintiff and defendant as to the terms of his managing her property. Her only witnesses were her husband and herself, he corroborating her testimony to the effect that defendant said he would manage the property at the rate of three per cent, and that the three per cent included collection of rents, renting of flats, advertising if necessary, looking after the building generally, services for the month of February to be free and to terminate when not satisfactory. He was not a competent witness

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under the provisions of section 5 of the Evidence Act. (Gealy v. Gealy, 157 Ill. 33, 41; Dommon v. Dommon, 236 Ill. 341; Stephens v. Collison, 256 Ill. 238.

But the only material bearing his testimony had was on the disputed question whether the contract included advertising. While defendant contended it did not his own testimony does not disclose any specific arrangement or obligation for plaintiff to pay for advertising or anything from which authority for incurring it at her expense could be implied. The husband's testimony, therefore, can not be considered harmful error.

Presumably the three per cent related to the rate allowed for collections of rent, as defendant credited himself at that rate for rents collected and the item was not questioned.

But defendant sought to justify his credit of \$465.45, either by the rules of the Chicago Real Estate Board or a custom among realtors or real estate brokers on the termination of a management contract to charge for the negotiation of leases upon the basis of their unexpired terms. As there was no adequate proof that the contract was entered into with reference to such rules, and no evidence or offer of competent evidence that customers of real estate brokers or agents were bound by any such custom, the court properly excluded evidence and offers of evidence of such rules or custom.

While defendant was entitled to an instructed verdict at the close of plaintiff's case, for failure to prove any definite balance due her, defendant waived the point by putting in his own evidence.

Appellant contends that plaintiff was bound by the credits as well as the debits of the statement, on the theory that she "used" the statement as the basis of her claim, which might be true if plaintiff had introduced the statement without discrediting the credit items in dispute, which we think her

testimony respecting the limits of the contract tended to do.
(Howell v. Moore, 127 Ill. 67.)

Appellant also complains of the admission, over objection, of certain testimony tending to impeach credits for payments of the insurance premiums. As the testimony was subsequently withdrawn and the credits allowed and not questioned, it is difficult to see that defendant was harmed thereby, or by exclusion afterwards of affirmative evidence of the payments.

We think there is no reversible error.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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217 - 36070

HYMAN LEVINE,

Appellee,

vs.

MAX N. BLOCK,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

238 I.A. 631³

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

The question presented by this appeal is whether the court abused its discretion in refusing to vacate a judgment by confession upon a promissory note for \$3500 containing the usual power of attorney to that end.

The note, of which plaintiff claims to be the holder, is payable to the order of one Davis. While appellant claims that plaintiff was not a bona fide holder of the note before its maturity, that point is immaterial if the defenses set up in the affidavit in support of the motion to vacate are not such as would justify granting the motion.

The main ground upon which the motion rests, as disclosed by the affidavit, is that in negotiations between Davis and defendant Block for an exchange of apartment buildings it was agreed that their respective values were to be determined on the basis of their gross rentals, and Davis made a misrepresentation with respect thereto, in that he alleged that one of the apartments of his building was leased to one Hefeli, whereas the latter had no lease and paid no rent. The affidavit alleges that they entered into a written contract on that basis, upon which in adjusting differences said note was given to Davis, and taxes for the year 1924 were to be pro-rated, and any excess of taxes paid by Block was to be deducted from the note. The averments are to the effect that if

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The question presented by this appeal is whether the
tax court's decision in refusing to vacate a judgment of
dismissal upon a promissory note for \$1000 containing the word
"and" is properly affirmed.

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 and maintaining was not a historical subject of the past before the
 history, that point is illustrated in the following set up in the
 history in support of the position in regard to the past as well
 with examining the evidence.

The main ground upon which the motion stands, as disclosed by the affidavits, is that in many instances between 1904 and 1906 the defendant's management of the defendant's business was such that the defendant's business was not conducted on the basis of profit, but on the basis of loss, and that the defendant's management was such that the defendant's business was not conducted on the basis of profit, but on the basis of loss, and that the defendant's management was such that the defendant's business was not conducted on the basis of profit, but on the basis of loss.

an allowance were made to the amount that would accrue under the Hefeli lease, if the representation were true, and the excess taxes were deducted, there would be nothing due on the note.

From these averments it is perfectly apparent that defendant seeks to interpose a defense by way of recoupment or set-off. Whatever grounds he may have for such a defense, a judgment by confession will not be set aside or opened up merely for the purpose of permitting a plea of set-off, or to enable defendant to maintain a cross action. (Mansfield v. Stauffer, 201 Ill. App. 132; Kochler v. Glann, 169 id. 537.)

Confronted with these authorities appellant in his reply brief states that he is merely seeking to defend on the ground of a failure of consideration by reason of said fraud. But as "fraud must relate to the execution of the note and not to the consideration on which it is based," such a defense cannot be maintained. (Kellogg v. Hall, 190 Ill. App. 15.)

By the terms of the contract (which the court permitted to be filed along with the affidavit) defendant expressly agreed to pay the sum of \$3500, to be evidenced by said note, and certain adjustments were to be made "on consummation of the deal." Whether the deeds have been exchanged does not appear. But we find nothing in the contract itself which would relieve defendant of his obligation to pay the note therein provided for. All prior negotiations, of course, were merged in the contract, and whatever defense might have been interposed prior to a judgment upon the note, it can not be said that there was any abuse of discretion by the court in refusing to open up the judgment or vacate the same on the grounds set forth in the affidavit.

AFFIRMED.

Gridley, J., concurs.
Fitch, J., dissents.

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1984

1940

NORMAN HECHT, PETER DOHN
and LAWRENCE CARLSON,
(complainants below);

I. B. OPAT,
Appellee,
vs.

THE TOURIST CAMP BOBY CO.,
(a corporation),

ON APPEAL OF LEWIS E. BOWER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 631⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The questions on this appeal arise on an intervening petition by Opat, appellee, to enforce against appellant, Lewis E. Bower, payment of a chattel mortgage note, which Opat claimed to have purchased. The main issue is one of fact, whether Opat purchased the note or paid it for one Michna, the maker and mortgagor. Except as to a variance between the testimony of Opat and Bower's agent, with whom the dealing was had, there is no material dispute of fact.

Two chattel mortgages, dated June 18th and July 10th, 1923, respectively, were given by Michna conveying the same property and securing a like series of three notes. No. 1 for \$725, No. 2 for \$2000, and No. 3 for \$2000, due one, two and three months from date respectively. Each note was given to secure the same indebtedness and the second was intended to displace the first.

The note in question was No. 1 of the first series, but though not exchanged for No. 1 of the second series, it is conceded that the equitable rights of appellee are the same as if he were the holder of No. 1 of the second series of notes.

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THE COURT, BY THE COURT,
A. J. HARRIS,
Clerk of the Court.

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appealed,

vs.

A. J. HARRIS, Plaintiff,
vs.
A. J. HARRIS, Defendant.

THE COURT, BY THE COURT,
A. J. HARRIS,
Clerk of the Court.

THE COURT,

appealed,

vs.

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THE COURT, BY THE COURT,

appealed,

The Court in this appeal was an interesting
discussion by the parties, as to the nature of the
appeal, and the Court, after a careful review of the
facts, found that the appeal was not a proper
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The Court in this appeal was an interesting
discussion by the parties, as to the nature of the
appeal, and the Court, after a careful review of the
facts, found that the appeal was not a proper
one, and that the Court should not interfere.

all of which continued to be held by Bower, the mortgagee, after their maturity until March 28, 1924, when he foreclosed the second mortgage and bid in the property for \$2000. The property was worth the amount of the mortgage.

On the sole issue of fact, whether Opat paid the note for Michna or bought it, the court found for Opat and ordered Bower to pay to him \$794.77, the amount due on the note with costs.

It would subserve no useful purpose to set forth the contradictory testimony bearing on that fact, as it presents mainly a question of correct recollection or credibility of the two persons between whom the deal was had. We need not repeat that in such a case this court will not disturb the decree or judgment unless it is clearly manifest from the record that the greater weight of the evidence does not support it. (American Cigar Co. v. Beyer, 221 Ill. App. 235.) It is not so manifest to us.

Because there was no replication, appellant invokes the doctrine that when a cause is submitted on bill and answer the answer is to be taken as true. But it was not so submitted and when as here evidence is heard the issues will be treated as having been regularly joined. (Dempsey v. Burns, 221 Ill. 644.)

As the note was the first of the series to mature it had priority of lien on the property over the notes for non-payment of which the foreclosure was had, in the absence of a different agreement, and appellant was rightfully held liable in equity under the circumstances for the sum decreed to be paid in satisfaction of the note.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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257 - 30110

PECK & HILLS FURNITURE CO.,
Appellee,

vs.

CHAS. F. LOHREMAN,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 632

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit upon a stated account, alleged in the statement of claim and the affidavit of claim to be \$329.35 on March 26, 1923. Defendant's affidavit of merits denied the indebtedness and that there was an agreed or adjusted account.

Defendant was not present or represented at the trial. The proof fully supported the claim that there had been an adjusted account for such amount. There was evidence that on said date defendant in reply to the statement of plaintiff's counsel that the amount due was \$329.35 and plaintiff had been patient, said he wanted to pay as soon as he could and would pay interest on the account. This amounted to a stated account. The verdict and judgment include interest from that date, and appellant's main reliance for reversal is that they should not. He does not question that interest runs from the time of liquidating an account, (Luettgart v. Volker, 153 Ill. 385, 390) but on the fact that it was not specifically claimed. The ad damnum exceeded the amount of the judgment, and interest is properly computed as damages on the principle above stated.

We think the judgment should be affirmed.
AFFIRMED.

Gridley and Fitch, JJ., concur.

F. E. SCOTTEN, doing business
as F. E. Scotten Bank Service,
Appellee.

vs.

EDGEWATER TRUST AND SAVINGS
BANK, (a corporation).
Appellant.

4675A
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 632²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$828.36 entered
on the finding of the court in a suit for a breach of contract.

By written agreement, plaintiff agreed and defendant
authorized him "to secure a maximum of 2500 new depositors" for
defendant bank. No time, however, was fixed in said agreement
within which it was to be performed. It was dated Nov. 17,
1921, and according to plaintiff's testimony there was a mutual
agreement to suspend his solicitation of depositors until the
following July, when he offered to resume his efforts but
certain officers of the bank refused to have him continue them.
He was paid for what he did under the contract and the suit
is for what he claims would have been his profits, if permitted
to resume.

Points are made and argued respecting the authority
of said officers, and the controverted testimony as to what
was said between them, and as to the time of the conversations.
But a discussion of the evidence on these points is unnecessary,
if, as we think, the contract was not enforceable.

It is a well established doctrine that where no time
is fixed during which an agreement shall continue in force it

is terminable at the will of either party. (Joilet Bottling Co. v. Brewing Co., 254 Ill.219, and cases there cited.) There being no time fixed for performance, neither party could require the other to perform or respond in damages after the other had repudiated the contract.

Assuming therefore that there was sufficient proof to show a repudiation of the contract on the part of defendant, yet on the principle stated defendant could terminate it and was not legally liable for speculative profits after it did so.

As there could be no recovery at law on such a contract the judgment will be reversed.

REVERSED.

Grisley and Fitch, JJ., concur.

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As there would be no recovery of law in such a

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30195

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322 - 32173

HENRY MOSS,
Appellee.

vs.

H. R. DUKET,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.
238 I.A. 632³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a suit to recover rent, in which a judgment was entered April 15, 1924. Defendant pleaded a constructive eviction and right to recoup damages, but did not appear at the trial, claiming that neither he nor his attorney received notice of the assignment of the case to the judge who presided at the trial. Learning of the entry of the judgment some four months later he moved to have the judgment vacated on that ground, which was done on October 10, 1924. A few days later the latter order was vacated on plaintiff's motion. From the order vacating the order of October 10th, and denying defendant's amended petition of October 20th to vacate said judgment this appeal was taken.

As the judgment stood vacated when defendant filed his so-called amended petition, it cannot consistently be treated as such. In effect it was an affidavit opposing plaintiff's motion to vacate the order of October 10th. Hence the appeal must be treated as one from the order vacating the order of October 10th.

The court had no jurisdiction four months after the entry of the judgment to vacate the same, except upon a motion writ of error in the nature of a restitution coram nobis or upon a motion based on

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Approved: A. Smith, Jr., Chief, Bureau of Census, U.S. Department of Commerce

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Other was reported on Glasnost's website. From the above reporting

1. *What is the purpose of the study?*
 2. *What are the research objectives?*
 3. *What is the research design?*
 4. *What are the variables?*
 5. *What are the hypotheses?*
 6. *What are the results?*
 7. *What are the conclusions?*
 8. *What are the limitations?*
 9. *What are the implications?*
 10. *What are the future research directions?*

Large air transport line owner of 1970 wanted to retire

• **2001** •

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such facts as would justify such an order by a court of equity. The record does not disclose that the judgment was vacated on either of these grounds, but simply upon the claim that defendant or his counsel did not receive due notice of the assignment of the case. In the absence of showing that such a notice was required, or that there was any mistake of fact, the motion to vacate predicated upon such a claim was not one in the nature of a writ of error certam nobis, nor such as gives the court jurisdiction under Sec. 21 of the Municipal Court Act to vacate a judgment entered more than 30 days prior thereto.

In this state of the record we have no other recourse than to affirm the judgment.

AFFIRMED.

Gridley and Pitch, JJ., concur.

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331 - 30184

FANNIE D. RUPERT,
Appellee,

vs.

SAMUEL L. COOPER et al.,
On appeal of MINNIE EVERS
et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

238 I.A. 632⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure of a trust deed executed by Samuel L. Cooper to secure his notes, numbered 1 to 48 inclusive. At the time of filing the bill of complaint appellee, Rupert, was the owner of notes numbered 14 to 44 inclusive, all of which were payable at the Continental and Commercial National Bank. No. 14 fell due April 8, 1924, and because of default in the payment of the same appellee in the latter part of that month exercised her election in accordance with a provision of the trust deed to declare, and did declare, the whole of the principal sum due upon the said notes and began this suit.

The title to the land conveyed by the trust deed was in appellant Minnie Evers through a warranty deed from said Cooper and she urges two grounds for reversal of the decree, first, that in justice and equity there was no default in payment of note 14, and second, no personal decree should have been entered against her.

In support of the first point she claimed that some

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• To understand the extent of the problem at hand

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the situation in the Republic of China (Taiwan) and the Commission is therefore unable to make any statement on this matter.

No. 1186 was verified by salt and is equivalent to No. 1096.

1. The first step is to identify the problem or question that needs to be answered.

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person in the bank extended the time of payment of note 14 until April 18th, and that she sent a check to pay the same on April 22nd, before any declaration of forfeiture, and that the check was returned to her by the bank after the suit was begun, and without notice to her. While there was some conflict of evidence bearing upon the time the check was received by the bank, yet she was unable to identify any officer or employee of the bank as the person who assumed to extend the time of payment. But, regardless of the claim there was no proof that any officer or employee of the bank had any such authority, or that complainant knew of its alleged exercise. There is little ground for appellant's first contention that the suit was not brought in good faith, and upon a proper declaration of default.

But with respect to the second point there is no proof in the record on which to base that part of the decree to the effect that Minnie Evers is personally liable for payment of the debt secured by said trust deed and that she shall pay the deficiency if any is reported; or that she should pay solicitor's fees as provided for in said trust deed. It does not appear that there was any assumption clause in the deed conveying her the premises, (which, however, was not introduced in evidence) or that she otherwise assumed the indebtedness secured by the trust deed. Appellee cites Ludlum v. Pinckard, 304 Ill. 449, as applicable to the case because Minnie Evers made ten or twelve payments on the mortgage indebtedness "without restrictions." In that case the payments on the mortgage debt were made by the grantee of the mortgaged premises. But the deed of conveyance contained a clause assuming the mortgage debt, and the court held that under these circumstances, in the absence of any proof limiting the effect of the payments, they would show an acceptance of the assumption clause. But here there

...in the bank statement for time of payment of note is well
...and that she sent a check to pay the note on April
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...There is little ground for appellant's
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...with respect to the amount paid there is no proof in
...to have been paid at the time of the check in the effect
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...In fact none of the payments on the
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...of the deed of mortgage contained a clause providing the mortgagee
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is no assumption clause to accept, and we are cited to no authority holding that a mere voluntary payment of a portion of the debt can be construed into a contract to pay the whole of it.

Not only is there no proof of such assumption but no averment of it in the bill and no prayer for relief against appellants on the basis of it.

As, therefore, appellants were not bound by the covenants of the trust deed, the decree must be reversed so far as it finds and decrees Minnie Evers to be liable for the debt or any deficiency, or for solicitor's fees. But as she did not maintain her defense against the right to foreclose, she is properly taxed with the costs of the suit. Hence the decree will in all other respects be affirmed.

Affirmed in part and reversed in part.

Gridley and Fitch, JJ., concur.

the commission clause in equity, and on the right to the
property holding that a mere voluntary payment of a portion
of the debt can be converted into a contract to pay the whole

— that only in cases no proof of such conversion was
necessary of it in the bill and no proper for relief against
application on the basis of it.

As, therefore, appellant was not bound by the provisions
of the trust deed, the money must be returned to her as it stands
and because it was hers to be liable for the debt or any deficiency,
the appellant's loss. But we also find no evidence for recovery
against the estate as trustees, and in respect of the estate
of the wife. Hence the answer will in all other respects be
affirmed.
— affirmed in part and reversed in part.

REALLY and VICE, JJ., dissent.

NAT GINSBERG et al.,
Appellees,

vs.

RUBIN BALLIS,
Appellant.

4678a

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 632⁵

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question involved on this appeal is whether the court was justified in entering a judgment against defendant for \$950.08, and retaining jurisdiction as to the rest of plaintiffs' claim, which was for \$2,170.95, on the theory that defendant's affidavit of merits admitted said sum to be due.

The affidavit, after disputing certain charges and claiming certain credits, sets up that he "tendered to plaintiffs the sum of \$950.08, by check, in full payment of plaintiffs' account with defendant, to the date thereof, which check was accepted by plaintiffs."

While the affidavit does not expressly state that the check was accepted in payment, yet its purport is that it was accepted as a "tender in full payment" on an account and satisfaction. But having paid that amount we are unable to construe it as an admission that he owed \$950.08 additional whatever the amount plaintiffs claimed.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

JOHN DULLA and
MATILDA DULLA,
Appellants,

vs.

GUSTAV PTACEK,
Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

238 I.A. 633

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellants were the assignees of a written lease of certain premises to appellee at \$140 per month for five years from March 15, 1923, and brought this suit to recover rent under the lease for the month from June 15 to July 15, 1924. The rent was paid prior to June 15th, and after July 15th it was paid by defendant to one Masaryk who purchased the premises. It was not paid for the month in question, appellee claiming that on May 26, 1923, while the negotiations for the sale of the premises to Masaryk were pending, John Dulla for himself and as agent for Matilda Dulla promised him as an inducement to remain in the premises and not abandon them, in accordance with his expressed intention, and as a help to a favorable conclusion of the negotiations, to give him two months rent free and \$250 cash if the sale went through. Based upon that claim appellee pleaded a set-off to the amount of \$530, and on a trial without a jury the finding and judgment of the court were against appellants for \$390, the court evidently deducting from appellee's claim as aforesaid the rent for the month in question and allowing the rest of his set-off.

As there was absolutely no proof of any authority what-

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THESE RESULTS ARE IN ACCORD WITH THE FINDINGS OF OTHER RESEARCHERS.

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1. The first group of people who are not included in the study are those who are not members of the church.

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ever on the part of John Dulla to make any such contract for the joint plaintiff Matilda Dulla it is unnecessary to consider other grounds urged for reversal.

It is fundamental that where there is more than one plaintiff a plea of set-off must be good as against all of them or it can not be entertained. The absence of any proof of liability on the part of Matilda Dulla on the set-off requires, therefore, a reversal of the judgment. In its absence the court, regardless of whether John Dulla made the promise claimed, should have rendered judgment for plaintiffs, for the promise not being binding on both plaintiffs the lease remained unmodified, and hence defendant was liable to plaintiffs for the admittedly unpaid rent of \$140 for the month in question, and there can be no judgment against plaintiffs jointly on the set-off.

As we are not concerned with any right of action appellee may have against John Dulla alone on his promise, if made, we should render such judgment here on the facts as should have been rendered thereon by the trial judge. Defendant was not precluded from proving a joint liability by any ruling of the court but simply failed to make any proof to establish it, and his failure in that respect has not been questioned in appellee's brief. The judgment, therefore, will be reversed with findings of fact where they differ from what the lower court must necessarily have found to render a judgment on the set-off.

Counsel for appellee seems to misapprehend the force of Mirich v. Forscher Contracting Co., 312 Ill. 343, which changed the previous construction of the law as to the power of this court to find the facts on appeal from a judgment based on a jury's verdict, but it did not construe the law as precluding this court from finding the facts different from the findings of the trial

on the part of John Dill is made by such conduct as
joint liability which will be necessary to establish
the grounds upon which reversal.

It is fundamental that where there is more than one

plaintiff a plea of set-off must be filed as against all of
them and it can not be entertained. The absence of any plea
of set-off on the part of William Dill on the set-off re-
quest, therefore, a reversal of the judgment. In its absence
the court, regardless of whether John Dill made the promise
alone, should have rendered judgment for William Dill, for the
issue not being joined as both plaintiffs the issue remained
undisputed, and hence judgment was given to William Dill
wholly and as a matter of fact for the money in question.
There can be no judgment against William Dill's estate on the
set-off.

As we are not concerned with any right of action

which may have existed John Dill alone on his promise, if
it, we should render such judgment here on the facts as should
be rendered thereon by the trial judge. Defendant was
precluded from proving a joint liability by any ruling of the
court but simply failed to make any plea to establish it, and
therefore in that respect was not even mentioned in
William's brief. The judgment, therefore, will be reversed with
costs of last entry they either from what the court would want
amounts have found to be a judgment on the set-off.

General for appellee seems to misapprehend the facts of

John Dill's promise, which was

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that the facts as against John Dill's promise based on a party's

testimony, but it is not necessary for the law as provided the court

Judge. (See subsequent opinion in said case filed in this court December 16, 1924, case No. 26591.)

REVERSED WITH FINDINGS OF FACT.

Gridley and Fitch, JJ., concur.

THESE ARE THE RESULTS OF THE INVESTIGATION

CONDUCTED BY THE BUREAU OF INVESTIGATION

ON THE MATTER OF THE ALLEGED VIOLATION OF THE

ANTI-TRUST ACTS

AND THE RESULTS OF THE INVESTIGATION
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AND THE RESULTS OF THE INVESTIGATION
CONDUCTED BY THE BUREAU OF INVESTIGATION
ON THE MATTER OF THE ALLEGED VIOLATION OF THE
ANTI-TRUST ACTS

352 - 30305

FINDINGS OF FACT.

We find that there was no joint promise on the part of appellants John Dulla and Matilda Dulla to give appellee Gustav Ptacek rent free for the two months from June 15, 1923, to August 15, 1923, and pay him \$250 cash if he remained in the leased premises in question, and that there was no entry into a joint contract on which the set-off is based, and that the rent sued for, to-wit, \$140 is unpaid and due appellants without any right of set-off against them jointly.

46802

DEANIS BURNES,
Appellee,
vs.
MORTON S. MAKIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 633²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action in tort for the recovery of \$600 alleging fraud and deceit in the execution of a lease.

Attached to the lease was a "rider," providing for the deposit of the \$600 to be retained by the lesser as security for the faithful performance of the covenants in the lease, and containing the provision that said sum shall for no other reason become the property of the lessor, "except in case the premises within are closed by the State or the United States Government or the lessee fails to pay rent each month on the 15th of every month."

The premises, as we understand the evidence, and it does not seem to be controverted, are included in premises that were closed for one year by a decree of the federal district court adjudging them to be a common and public nuisance and enjoining Makin and one Wiegand (a lessee), and any one claiming under them, from manufacturing, selling, etc., any liquor in said premises. The suit in which said decree was entered was pending when the lease to Burnes was executed, and he contended that he had no knowledge of it, and that Makin fraudulently concealed the fact from him.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

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This is to certify that the following is a true and correct copy of the original as filed in the records of the Department of Justice.

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The deposit of the \$1000 to be retained by the United States Department of Justice is hereby certified to be a true and correct copy of the original as filed in the records of the Department of Justice.

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The fact of any such concealment was controverted, and we think there is a clear preponderance of evidence against the theory of liability on the part of Makin, as found by the court. The finding was against defendant in the sum of \$400, the court deducting from the \$600 the unpaid rent of \$200 for one month, which appellee assigns as error.

Plaintiff's evidence as to the fact of such concealment consisted solely of his own testimony and of one Kilmartin to the effect that at the time the lease was executed nothing was said about the existence of such a suit, and of the claim that he knew nothing about it. But Makin and his brother testified that Burns was informed of the proceeding, not however at the time the lease was executed but during preliminary negotiations when Kilmartin was not present, and that Makin then said to Burns "that if anybody took a lease and sold moonshine they would close up the place and he would lose his money," and that Burns replied he "didn't care."

The fact that the place was already under the ban of such a proceeding, and that Kilmartin, who apparently would be affected by the decree, was getting Burns to take the lease off his hands at such a time for "a soft drink parlor," furnishes plausible grounds for believing that all the parties had knowledge of the suit and that Makin required the deposit to secure himself against further use of the place in violation of the prohibition law.

But Burns admitted that prior to the injunction his place was "closed up" and his license to conduct the place was revoked because, as he said, "the mayor was making it dry," from which we may infer that the place was also while under his control conducted in violation of said law. This inference is strengthened

by the fact that his attorney objected to inquiries as to the sale and possession of intoxicating liquor in the place when in his possession. While we think the court erroneously sustained the objections, plaintiff's reluctance to go into the matter is significant.

Reaching the conclusion that on the whole record the court's finding was manifestly against the weight of the evidence as to defendant's liability, the judgment will be reversed with findings of fact. This conclusion obviates the necessity of discussing the cross errors, on which appellee claims the judgment should have been for \$600.

REVERSED WITH FINDINGS OF FACT.

Gridley and Fitch, JJ., concur.

by the fact that his primary object in traveling was to the south and westward of the existing line in the case of the

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361 - 30214

FINDINGS OF FACT.

We find that appellant Makin was not guilty of any fraudulent or deceitful action whereby appellee was induced to enter into the lease in question and make the deposit therein provided for, and that appellant did not conceal from appellee at the time of the execution of said lease the pendency of the suit under a decree in which the premises in question were closed as a common nuisance, and that the premises were again closed for violation of the prohibition law while in the possession of appellee.

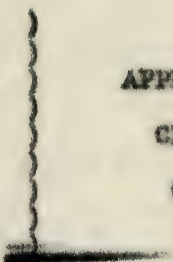
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379 - 30232

LOUIS WALD,
Appellee.

vs.

ABN COHEN,
Appellant.



APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

238 I.A. 633³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree for an accounting making findings substantially as reported by the master.

It is conceded that the right to an accounting depends solely on whether appellant discharged appellee from his employ for good and sufficient cause - a mere question of fact which both the master and chancellor found against appellant's contention. In such a case, unless there is apparently upon the face of the record insufficient evidence to justify the decree, we ought not to be asked to review the evidence, especially where the credibility of witnesses figures, upon mere captious criticisms of its force. We think criticisms of the evidence on which the findings are based are mainly of that character. We shall not attempt to discuss them.

Appellant hired appellee under a written contract for two years from December 6, 1916, to design patterns for ladies suits and cloaks, and to manage the cutting and trimming department of his store, and to do such other things as directed, and, on November 14, 1917, discharged appellee from his service. Appellant's main contention, when reduced to its final analysis, is that there was a loss of goods on misfit garments from improper combining of patterns, a practice, which in itself is, according

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Table 1-10 in appendix one - some statistics on food

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to the testimony of several designers, customary in such line of work. Appellant testified to some complaints he made to appellee about so-called misfits, and put him on another line of work, as he had a right to do under the contract. He did not then see fit to dismiss appellee on any ground of complaint he had made, or on which he relied for his defense, but after retaining him for several weeks in other branches of his service dismissed him because, to use his own words, "he couldn't have him in the place any more," or in the words of appellee, "the end has come * * * you have not done your duty; the corporation won't have you here any more."

The so-called "corporation" consisted merely of the name under which appellant did business.

We have reviewed the evidence and find no good reason for disturbing the findings upon which the accounting is ordered.

The decree, therefore, will be affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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PETER VANDELIND, Administrator
of the estate of Hugo Vandelind,
deceased.

Plaintiff in Error,

vs.

PETER KHABER, also known as
Peter Khabarnaktis,

Defendant in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 632

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This was a statutory action for wrongfully causing the death of a seven years old boy. The accident happened on Halsted street, Chicago, between 79th and 80th streets. That street is a well built up business street. On the west side of the street, in the middle of the block, is a theater, and opposite the theater there is, and has been for years, a regular stopping place for passengers to alight from the street cars. Immediately north of the stopping place, the street cars "loop" to the east on property of the street car company. Plaintiff's intestate, in company of an older brother aged ten, on their way to the theater, alighted from a northbound street car at the stopping place when the car stopped. It was a Sunday afternoon, about one o'clock. The older boy went to the east sidewalk. The younger boy went around the rear of the street car, was seen to look both ways and hesitate, and then start to run to the west sidewalk in front of the theater. Defendant's automobile, coming south on the west street car track at a speed of from ten to twelve miles an hour, hit the boy and killed him. No warning was sounded by defendant.

At the beginning of the trial, when plaintiff's attorney was attempting to make a statement of these facts to the jury,

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STORY OF THE WORLD

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no record of the same in the
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This was a photograph taken from a car window looking down the street. The car was moving slowly, and the camera was pointed out the window. The street was lined with buildings, and there were several cars parked along the side. The photograph is somewhat blurry, but it appears to be a candid shot of a street scene.

the court interrupted him and stated, in the presence of the jury, in substance, that a speed of twelve to fifteen miles an hour was not a violation of the law, that defendant "did not have to pay attention, because the street car stops there," but "had the right to assume that people will not pass in front of his car in the middle of the block," argued with plaintiff's attorney on these and other supposed questions, and then said, several times, that he could not let plaintiff "go to the jury on such a case" but that the attorney might go on and put in his evidence. The facts above stated were then proved and, uncontradicted, they make a prima facie case of negligence on defendant's part and of the exercise of such care as would be expected of a child seven years old under the circumstances shown. At the close of the plaintiff's evidence, the court peremptorily directed the jury to find a verdict for the defendant, which was done and judgment entered accordingly. The transcript shows the court's action was arbitrary and erroneous. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

... court investigated him and asked, in the presence of the
... in evidence, that a good deal of time in 1880 was
... was not a violation of the law, that statement was made
... in my opinion, because the same was made then,
... that the right to know that people will not pay in front
... his son in the middle of the street," agreed with plaintiff's
... away on them and other persons present, and then said,
... went home, that he would not let plaintiff go to the jury
... such a man, but that the attorney should go on and pay in
... evidence. The facts above stated were then proved and, un-
... contradicted, they were a fitting basis for the judgment in
... plaintiff's favor and of the justice of which there is no
... of a child seven years old under the circumstances
... At the time of the plaintiff's witness, the court dis-
... finally directed the jury to find a verdict for the defendant,
... and was done and judgment entered accordingly. The testimony
... and the court's action was arbitrary and erroneous. The judg-
... of is reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE

Wm. T. C. and Society, 7.1. 1880.

4683a
ZELL F. KARENTON et al.,
Plaintiffs in Error.

vs.

ANNA PIOTROWSKI,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 633⁵

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

On defendant's motion, plaintiffs' amended statement of claim was stricken, and plaintiffs electing to stand by it, their suit was dismissed at their costs. Plaintiffs assign error upon this ruling of the trial court.

The amended statement of claim alleges that plaintiffs' claim is for damages sustained by reason of defendant's failure to comply with the terms and provisions of a written contract between the parties, a copy of which was filed and is made a part of the amended statement by reference. That contract provides that defendant agrees to buy certain described real estate and plaintiffs agree to sell and convey the same by a good and sufficient warranty deed upon the payment of \$17,250, subject to an incumbrance thereon of \$7500 and certain specified taxes and special assessments, "seller to give up possession of property April 15, 1924," and that "a certificate of title issued by the Registrar of Titles of Cook County, or complete merchantable abstract of title, or merchantable copy brought down to date hereof, or merchantable title and guaranty policy made by the Chicago Title & Trust Company, shall be furnished by the vender within a reasonable time." The amended statement of claim further alleges that on the date the contract was entered into, plaintiffs had a

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• BATES 200 40 THERMAL AND HUMIDITY SENSITIVE . . .

It was his business as their doctor, Williams' position
as their physician, and Williams' position as their
physician, and Williams' position as their physician.

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On the 1st day of January, 1904, the plaintiff was engaged to sell and convey the land to the defendant for the sum of \$10,000, and to execute a deed of conveyance therefor. The defendant was engaged to pay to the plaintiff the sum of \$10,000, and to execute a deed of conveyance therefor. The plaintiff was engaged to sell and convey the land to the defendant for the sum of \$10,000, and to execute a deed of conveyance therefor. The defendant was engaged to pay to the plaintiff the sum of \$10,000, and to execute a deed of conveyance therefor.

good title to the real estate; "that they never rescinded said contract," but ever since the date of the contract have "been always able, ready and willing to do and perform all things on their part to be done and performed according to the terms and conditions of said contract;" that defendant has refused to perform the contract on her part, and on April 13, 1924, attempted to rescind it and for that purpose served a notice in writing on the plaintiff, "setting forth therein groundless reasons;" that shortly thereafter, plaintiffs tendered to defendant a warranty deed, which defendant refused and also refused to pay the purchase price mentioned in the contract; whereby, plaintiffs allege, they have been damaged in the sum of \$4000, etc.

It will be noticed that this amended statement of claim does not allege nor show performance of the contract on the part of the plaintiffs by furnishing, or tendering an abstract, or title policy or Terrens certificate. An allegation of a mere willingness and ability to perform is not equivalent to an allegation of performance or an offer to perform. Without such an allegation the amended statement of claim does not show any breach of the contract on the part of the defendant, and therefore states no cause of action.

This conclusion is admitted, in effect, in plaintiffs' brief, but they contend that in the Municipal court a statement of claim is not required to state a cause of action. The contrary was held in Lyons v. Kanter, 285 Ill. 336.

The record shows that in the original statement of claim there was an averment that plaintiffs caused an abstract of title to be brought down to a date after the date of the contract and delivered within a reasonable time to the defendant, as provided by the contract; that the title was not found to be materially defective within ten days thereafter, nor were the plaintiffs

The court then stated that the defendant's motion for summary judgment was denied. The court found that the plaintiff had established a prima facie case of breach of contract. The court stated that the defendant had failed to perform its obligations under the contract. The court also found that the plaintiff had suffered damages as a result of the breach. The court awarded the plaintiff summary judgment and damages of \$100,000. The court also awarded the plaintiff costs of litigation.

notified of any defects therein within ten days, as provided by the contract. These averments were omitted from the amended statement of claim, and therefore it must be presumed they were abandoned.

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

U.S. DEPARTMENT OF JUSTICE

Return of all things to their original state.

STATE OF NEW YORK

● 2008年12月12日

1. *Chlorophyll a* (Chl a) and *Chlorophyll b* (Chl b) are the two main types of chlorophyll found in plants. They are responsible for capturing light energy and converting it into chemical energy through the process of photosynthesis.

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THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

ANTHONY J. MOLAN,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

238 I.A. 634

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This writ of error questions the validity of a judgment convicting the defendant of the criminal offense of maliciously threatening to accuse one George Galves "with violation of the Auto Speed Law, with intent to extort money" from him. The transcript consists only of a copy of the information and a copy of the judgment. An inspection of this record shows, however, that defendant was convicted of an offense which is not charged in the information.

The information alleges that on a certain day, at the City of Chicago, defendant knowingly and maliciously threatened to accuse Galves of a "violation of the speed ordinance, with intent to extort money" from him, contrary to Section 93 of the Criminal Code. The judgment order recites that after the court heard the testimony of witnesses and arguments of counsel, defendant was found guilty "as charged in the information." Upon this finding, the only judgment that could properly be entered was a judgment which followed the information, viz., that defendant was guilty of maliciously threatening to accuse Galves of the criminal offense of violating the "speed ordinance" of the City of Chicago. The violation of such an ordinance, if there was one in existence, is clearly not the same offense as violating the "Auto Speed Law." The only law which answers that

1934

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 1st day of January, 1934.

CLERK OF THE COURT

RECEIVED
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388 I.A. 634

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 1st day of January, 1934.

CLERK OF THE COURT

This writ of error questions the validity of a judgment rendered by the Circuit Court of Cook County, Illinois, in a case wherein the defendant, George Davis, was convicted of the crime of armed robbery. The judgment was rendered on the basis of the testimony of the State's witnesses, who testified that the defendant had admitted to the crime. The defendant claims that the judgment is invalid because the State's witnesses were not properly examined and cross-examined. The defendant also claims that the judgment is invalid because the State's witnesses were not given the opportunity to explain their testimony. The defendant further claims that the judgment is invalid because the State's witnesses were not given the opportunity to rebut the defendant's testimony. The defendant also claims that the judgment is invalid because the State's witnesses were not given the opportunity to explain their testimony. The defendant further claims that the judgment is invalid because the State's witnesses were not given the opportunity to rebut the defendant's testimony.

The information alleged that on a certain day, at the place of the crime, the defendant was present and participated in the crime. The defendant claims that the judgment is invalid because the State's witnesses were not properly examined and cross-examined. The defendant also claims that the judgment is invalid because the State's witnesses were not given the opportunity to explain their testimony. The defendant further claims that the judgment is invalid because the State's witnesses were not given the opportunity to rebut the defendant's testimony. The defendant also claims that the judgment is invalid because the State's witnesses were not given the opportunity to explain their testimony. The defendant further claims that the judgment is invalid because the State's witnesses were not given the opportunity to rebut the defendant's testimony.

description is the Motor Vehicle Act and that statute abrogates all city ordinances on the same subject and forbids the passage of any new one. (Motor Vehicle Act, Sec. 26; Atres v. City of Chicago, 239 Ill. 237.)

The state's attorney concedes this, but says: "It is evident from the judgment of the court that it was the State law which complaining witness was to be charged with violating." We cannot assume that such is the fact. The record does not show that to be true and the trial court could not by its judgment change the charge as made in the information, nor punish the defendant for an offense of which he was neither accused nor found guilty.

Section 93 of the Criminal Code provides that "whoever * * * maliciously threatens to accuse another of a crime or misdemeanor * * * with intent to extort money * * * shall be fined in a sum not exceeding \$500 and imprisoned not exceeding six months." If the information had charged defendant with maliciously threatening to accuse Galves of a violation of the Motor Vehicle Act with intent to extort money from him, the threat would have been a threat to accuse Galves of a misdemeanor, and the information in such case would have stated a criminal offense under said section 93. As it is, however, the information does not charge that defendant threatened to accuse Galves of any crime or misdemeanor. Offenses prohibited by ordinance do not properly fall within the category of crimes or misdemeanors as those words are used in the Criminal Code. As there used, crimes and misdemeanors refer to the statutory offenses therein enumerated. Offenses prohibited by ordinance only, are quasi criminal, which is a term "intended to embrace all offenses not crimes or misdemeanors, but that are in the nature of crimes - a class of offenses against the public which

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have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties. * * * A quasi crime would not embrace an indictable offense, whatever might be its grade, but simply forfeitures for a wrong done to the public, whether voluntary or involuntary, where a penalty is given, whether recoverable by criminal or civil process." (Higgins v. City of Chicago, 68 Ill. 372. See also, Tully v. Town of Northfield, 6 Ill. App. 386, 389.) It has been uniformly held in this State that actions to recover penalties prescribed by ordinance are civil suits (City of Chicago v. Enghel, 232 Ill. 112; City of Chicago v. Streeter, 182 Ill. App. 463; City of Chicago v. Kenney, 35 Ill. App. 57) and are brought in the name of the city. As the offense charged in this case was not an offense against a State law, it was not properly brought in the name of the People.

Since the enactment of the Motor Vehicle Act, the only speed ordinances that the city may lawfully pass or enforce are ordinances regulating the speed of horses and other animals, vehicles (other than motor vehicles,) cars and locomotives. (City and Villages Act, Art. V, Sec. 31.) No case has been cited - and we know of none - holding that the violation of such an ordinance is a crime.

The judgment is reversed.

REVERSED.

Barnes, P.J., and Gridley, J., concur.

The Commission has been informed that the
 following information was received from the
 Department of the Interior, Bureau of
 Indian Affairs, on the 10th day of
 March, 1904:

Received 11 January 1993

111-773

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4685a

JOHN COUTRE,

Appellee,

vs.

ERNEST ERMEL, JULIA G. ERMEL
and JOHN FRED LANGE,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

238 I.A. 634²

ERNEST ERMEL, JULIA G. ERMEL
and JOHN FRED LANGE,
Appellants,

vs.

Cross-Bill.

JOHN COUTRE and HENRY MARTIN,
Doing Business as H. Martin & Co.,
Appellees.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree setting aside and declaring null and void as against the complainant two deeds of a house and lot in Chicago, and dismissing the cross-bill of the defendants.

Complainant is a judgment creditor of the defendant Ernest Ermel. His judgment is dated August 29, 1923. The suit in which the judgment was obtained was brought on June 13, 1923, and was upon a certiorari bond, given under the Workmen's Compensation Act, in October, 1920, by Henry Martin & Co. with defendant Ernest Ermel as surety, to secure the complainant, John Coutre, in case an award of the Illinois Industrial Commission in favor of complainant should be approved in the Circuit court. In February, 1921, while the certiorari proceeding was pending, the defendant Ermel conveyed to his wife two pieces of real estate in Chicago, and on July 23, 1923, while the suit on the bond was pending, Ermel and his wife conveyed the property to the defendant John

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Fred Lange. The bill alleges that both these conveyances were made without any consideration, for the purpose of defrauding complainant and preventing a levy upon and sale of the same under an execution upon complainant's judgment, and prays that such conveyances be set aside and the property subjected to the lien of said execution. Defendants' answer denies all the allegations of fraud in the bill and alleges that such conveyances were made in good faith and for valuable considerations. Later, defendants filed a cross-bill seeking to compel Henry Martin & Co. to pay complainant's judgment.

Upon a trial before the court, complainant called the defendants Ernest Ermel and Lange as his witnesses. Both testified that the conveyances in July, 1923, from the Ermels to Lange, were made upon good and valuable considerations paid by Lange to the Ermels at that time; that Lange had loaned to the defendant Ernest Ermel \$3000 at different times, in amounts of \$400 and \$500 each, for which said Ermel had given his promissory notes payable to Lange, each due a year after its date; that said notes were long past due; that no interest had ever been paid on them; that one of the pieces of property was a cottage and lot occupied by said Ermels as a home-stead and valued at about \$4000, which was transferred to Lange in consideration of the cancellation of all of said notes; that the consideration paid for the other piece of property was \$4000 in cash, paid by Lange to Ermel at that time. Only the first mentioned property is involved in this suit.

There is no direct evidence that these conveyances were not made in good faith and for the consideration stated by these witnesses, who were the only witnesses who testified upon that subject. While their story is attacked as improbable and while there are circumstances in evidence tending to discredit their testimony, yet complainant, by calling them as his witnesses, is precluded from

questioning their credibility. All the cancelled notes above mentioned were produced on the trial, marked "Paid by sale of property, John F. Lange." There is no competent testimony tending to contradict this evidence and it cannot be disregarded. But if it could and if the testimony of these two defendants, called by complainant, be disregarded, then there is no evidence in the record to prove the allegations of the bill. Appellee, therefore, is in the same situation as was the appellee in Luthy & Co. v. Paradis, 299 Ill. 380, where the court said (p. 383):

"The appellee claims that it is not bound by the testimony of the appellants though it called them as its witnesses, but that the truth may be shown by any competent testimony, even in direct contradiction of what the appellants, as witnesses for the appellee, may have testified to. There is no doubt that this is the law. The trouble about its application to this case is that there is no other competent testimony contradicting the testimony of the appellants. The fact that they may have been impeached by inconsistencies in their testimony or contradictory statements will not supply the lack of proof of the essential elements of the complainant's case. A party who calls his adversary as a witness cannot call in question the latter's credibility. That part of his testimony which makes in favor of the witness must be considered as well as that against him, and if there is no countervailing testimony it must be taken as true."

To the same effect is Chance v. Kingsella, 310 Ill. 515, 523.

For the reasons given the decree is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

1. The first of these is the fact that the evidence is not in the form of a confession, but is in the form of a statement made by the defendant to a third person. This is a material difference, for a confession is a statement made by the defendant to the authorities, and is therefore more reliable than a statement made to a third person. The fact that the statement was made to a third person is a material difference, for a confession is a statement made by the defendant to the authorities, and is therefore more reliable than a statement made to a third person.

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THE UNIVERSITY OF CHICAGO

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1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

SAM KORSNAX,
Appellee,

vs./

FRANK BALSIS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 634³

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$303 recovered after a jury trial in an action for damages to plaintiff's automobile in a collision with defendant's automobile, occasioned, it is alleged, by defendant's negligence. Defendant's main contention is that the court erred in not directing a verdict at the close of plaintiff's evidence. There is no such assignment of error, unless that may be considered as included in a general assignment that "the finding and judgment are contrary to the evidence. Waiving this, however, the rule is that on a motion to direct a verdict the motion should be denied where there is any evidence in the record which, with all its reasonable inferences and intendments, fairly tends to prove the plaintiff's case.

(Chicago City Ry. Co. v. Lannon, 212 Ill. 477; Libby v. Cook, 222 Ill. 306.) Here, there is plenty of such evidence. The testimony on behalf of plaintiff tends to prove that plaintiff's automobile was being driven north on Woodlawn avenue, at eleven o'clock in the evening of December 13, 1922, at a speed of about fifteen miles an hour; that as it approached 55th street, it slowed down to eight miles an hour; that the driver looked east and saw no automobile approaching from that direction; that he proceeded to cross 55th street and was nearly over the intersection when defendant's sedan, going west on 55th street at a speed of over thirty miles an hour, passed a street car half a block away on

that street and hit the right rear wheel of plaintiff's automobile, whirling it around and upsetting it. With such proof in the record it would have been error to grant the motion.

The contention of defendant's counsel that defendant had the right of way is fully answered by what is said in Salmon v. Wilson, 227 Ill. App. 386.

Plaintiff's counsel justly complain of the abstract and briefs filed by defendant, and urge that their matter and form justify the conclusion that the appeal was taken solely for delay, and they ask for statutory damages. While there is much force in the position taken by plaintiff, we are not satisfied that the appeal was not taken in good faith.

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

It is stated that the above named person is not a resident of the State of New York, and that he is not a citizen of the United States, and that he is not a resident of the State of New York, and that he is not a citizen of the United States, and that he is not a resident of the State of New York, and that he is not a citizen of the United States.

The question of the person's name is not a matter of public concern, and it is not a matter of public concern, and it is not a matter of public concern, and it is not a matter of public concern, and it is not a matter of public concern, and it is not a matter of public concern, and it is not a matter of public concern.

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The person's name is not a matter of public concern.

THE PERSON'S NAME IS NOT A MATTER OF PUBLIC CONCERN.

THE PERSON'S NAME IS NOT A MATTER OF PUBLIC CONCERN.

THE PERSON'S NAME IS NOT A MATTER OF PUBLIC CONCERN.

4687a

PEOPLE OF THE STATE OF ILLINOIS
ex rel. MARTIN HURWITZ,
Petitioner,

vs.

MANDAMUS.

JOHN F. HAAS, one of the Judges
of the Municipal Court of Chicago,
Respondent.

238 I.A. 634⁴

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an original proceeding in this court, seeking, by mandamus, to compel respondent, one of the judges of the Municipal court of Chicago, to sign and seal an alleged bill of exceptions tendered by the relator, Martin Hurwitz, to the respondent for his signature and seal in a fourth class action brought in that court by Butler Brothers against the relator.

From the petition, the answer of the respondent and the replication to the answer, it appears that the suit was brought on August 22, 1924, and the summons was made returnable on August 28, 1924; that the relator, Hurwitz, entered his appearance therein on or before the return day, without making any demand for a jury trial or paying any jury fee; that on the return day the relator appeared, by his counsel, and the cause was set for September 18, 1924, for trial, and on that day was postponed to the next day, when relator's counsel moved "for leave to file a jury demand," and respondent overruled the motion, on the ground that relator had waived his right to a jury trial by not demanding it at the time he entered his appearance, and by not paying the jury fee at that time; that on the same day (September 19, 1924), other motions were made regarding the statement of claim and affidavit of merits, and the cause was continued until October 20, 1924; that the relator did not, on September 19, 1924, nor at any time within thirty days

thereafter, present any bill of exceptions purporting to show the ruling of the court upon the motion for a jury trial, nor did he, within such thirty days, ask for time within which to present or file such a bill of exceptions; that on October 20, 1924, the case was called for trial and the plaintiff therein introduced its evidence, to all of which the relator, by his counsel, objected and moved that all of it be stricken on the ground that "the court is without jurisdiction because of the request for a jury trial," which motion was denied, whereupon, the relator offering no evidence, the court found the issues in favor of the plaintiff therein and entered a judgment against the relator for \$200, from which he prayed an appeal to this court, which was allowed upon his filing an appeal bond within thirty days, and a bill of exceptions within sixty days from that date; that the appeal was perfected by the filing of an appeal bond and is now pending in this court; that on December 3, 1924, relator presented to the respondent an alleged bill of exceptions, which respondent then marked "Presented;" that later, the matter came before the respondent several times on written objections filed by the plaintiff in that suit, and finally, on January 21, 1925, respondent refused to sign and seal the tendered bill of exceptions upon the ground that it did not state all that occurred at the time of the trial on October 20, 1924, and that it improperly attempted to show therein the motion for a jury trial made and overruled on September 19, 1924, more than thirty days prior to the trial. The bill of exceptions so tendered, which is attached to the petition for writ of mandamus, recites in the first two pages thereof, that the relator made a motion for a jury trial on September 19, 1924, and at the same time filed, in support of the motion, the affidavit of one of the relator's attorneys, sworn to on September 18, 1924,

...and, having my bill of exceptions returned to me the
...of the court upon the motion for a new trial, and all the
...and then return with the papers on
...this with a bill of exceptions; that on October 22, 1904, the
...was called by the court and the plaintiff's motion was
...the witness, to all of whom the witness, by his counsel, de-
...located and moved that all of the evidence on the ground that
...the court is without jurisdiction because of the witness's
...a jury trial, which motion was denied, whereupon, the witness
...affirmed his evidence, the court found the issue in favor of the
...defendant's motion and entered a judgment against the witness. The
...and, then, the witness moved to set aside the judgment and to
...granted upon his filing an affidavit that the witness's motion was
...bill of exceptions which state that the witness's motion was
...local was withdrawn by the witness at an agreed time and in his own
...ing in this court; that on December 2, 1904, the witness requested
...the respondent to allow him to withdraw his bill of exceptions, with
...then moved "withdrawn," and later, the witness moved for a
...remanded, moved again to withdraw his bill of exceptions filed by the
...defendant in that case, and finally, on January 22, 1905, the
...and returned to him and over the defendant's bill of exceptions upon
...the ground that it did not state all that occurred of the time of
...and trial on October 22, 1904, and that it improperly allowed to
...move through the motion for a jury trial and returned on
...October 22, 1904, with his bill of exceptions to the court. The
...bill of exceptions as furnished when it appeared in the witness's
...for evidence, moved to the time the papers thereto, that the
...relieve him a motion for a jury trial on December 22, 1904, and
...at the same time filed, as a motion of the witness, the following

stating that on the return day, he was in Colorado on his vacation and did not return to Chicago until September 24; and that the court, on September 19, overruled the motion and continued the cause until October 20, 1924.

Upon this showing, it is clear that the relator was not entitled, at the time of the trial, on October 20, 1924, or at any later date, to a bill of exceptions stating the ruling of the court upon the motion made on September 19, 1924. It was incumbent on the relator, if he desired to preserve for review the question of the correctness of the court's ruling upon that motion, to present a bill of exceptions showing such ruling, within thirty days from the date the ruling was made, or within such further time as, within such thirty days, might be allowed by the court to present such a bill of exceptions. (Franklin Park v. Franklin, 228 Ill. 591; Williams v. Webster Hotel Co., 315 Ill. 54; Hake v. Strubel, 121 Ill. 321; Galla v. C. & W. I. R. R. Co., 217 Ill. 325; The People v. Strauch, 247 Ill. 220, 225.) After the expiration of such thirty days, the respondent had no power to sign a bill of exceptions as to such motion and ruling (Hake v. Strubel, supra), and if he had done so, that part of it relating to such motion could have been expunged, on the motion of the appellee therein. (Franklin Park v. Franklin, supra.) This is conceded by the relator in his replication to respondent's answer, but he there makes the claim that he renewed his motion for a jury trial and it was again overruled on October 20, 1924. If such was the fact, the bill of exceptions, which he prepared and tendered, and which he seeks to compel the respondent to sign, does not show it. That document makes no mention whatever, except as above stated, of any motion for a jury trial. It might be inferred, perhaps, from

the recital that at the close of the evidence relator moved to strike out all the evidence "for want of jurisdiction because of the request for a jury trial," that a motion for a jury trial had been made and refused at some time; but as a bill of exceptions is the pleading of the party who prepares it, it is construed most strongly against him, and therefore cannot be taken or treated as a statement that such a "request" was made then, or within thirty days prior to that time. It follows that the respondent's action, in refusing to sign the tendered bill until the first two pages were expunged therefrom, and until other matters which occurred at the trial, if deemed to be material by him, and which were omitted, should be inserted therein, was correct.

In the relator's replication, he has inserted an alleged stenographic report of what occurred in January, 1925, when the respondent finally refused to sign the tendered bill of exceptions. The colloquy between the court and counsel at that time is wholly immaterial. The only essential matter that occurred at that time was the respondent's refusal to sign the bill of exceptions, and that is admitted in the answer of the respondent. While it is unquestionably the duty of a trial judge to sign a proper bill of exceptions when tendered to him, it is his exclusive province to determine the correctness of a bill which he is asked to sign. (The People, ex rel. v. Jameson, 40 Ill., 93; The People, ex rel. v. Williams, 91 Ill. 91; The People, ex rel. v. Chytrons, 163 Ill. 190; The People, ex rel. v. Halander, No. 29615 in this court, opinion filed December 30, 1924.)

For the reasons stated, the petition for mandamus is denied.

PETITION DENIED.

Barnes, P. J., and Gridley, J., concur.

[illegible][illegible]

For the reasons stated, the decision for summary judgment is affirmed.

HELE MORINE,
Appellant,

vs.

LOUISE C. ACHILLES,
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 634⁵

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

After a judgment by confession against defendant had been opened to allow her to plead, a trial was had before the court without a jury, resulting in a finding and judgment for the defendant. Plaintiff appeals and contends that the finding is against the weight of the evidence.

Defendant testified, in substance, that she employed plaintiff to build for her a five-room bungalow and that he agreed to build it for \$2900, which was later increased to \$3300 by agreement; that he ordered all the materials and she paid the bills; that she borrowed \$2500 from a bank and that after she had paid out more than the contract price he demanded a note for \$400 more, promising to complete the building if it was given to him and refusing to waive his lien unless he got it; that in order to get his lien waiver and thereby use the remainder of her loan from the bank, she gave him her judgment note for that amount; that he did not, however, finish the building, and she was obliged to pay over \$500 more to others for that purpose. As to most of these details, defendant was corroborated by her brother-in-law, a carpenter, who finished the building for her.

Plaintiff denied that he was ever employed by defendant to build her house. He claimed he was only employed to do the mason work and that the note was given him partly for that and partly for money he claimed he advanced to others for work and

THE COURT
IN THE
MATTER OF

THE ESTATE OF
JAMES C. SMITH
DECEASED

288 I. A. 684

THE COURT HAS CONSIDERED THE PETITION OF THE ESTATE.

After a judgment by confession against defendant and
the amount is allowed to be paid, a writ was not return
out of court a jury, resulting in a finding and judgment for
the plaintiff. Plaintiff appeals and contends that the finding
is against the weight of the evidence.

Defendant contends, in substance, that the plaintiff

is entitled to relief for her five-year marriage and that he

should be held to the \$10,000, which was later returned to him

in agreement; that he should all the materials and the price of

the same; that the plaintiff should have a writ of return of the same

and that he should have the same return of the same for the same

and that he should be held to the finding of the jury in the

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and that he should be held to the finding of the jury in the

labor on her building at her request. This story was uncorroborated and the transcript shows that the trial judge thought, after seeing and hearing the witnesses, that his story "did not look reasonable."

After reading the evidence, we are unable to say that the finding of the trial court was manifestly contrary to the weight of the evidence. The judgment is therefore affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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PETER TUTULES and
JOHN P. DIGNAN, doing
business as Tutules &
Dignan,
Appellees,

vs.

RICHARD E. ELLIOTT and
ANNA E. COTTER,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

238 I.A. 635

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, defendants seek to reverse a judgment against them for \$1074 for services rendered and expenses incurred by plaintiffs as real estate brokers for defendants.

Defendants admit they employed plaintiffs to effect a sale of their property, and agreed to pay them a commission of \$1000 in case a sale was consummated through their efforts. Plaintiffs found purchasers for the property, with whom defendants entered into a written contract. Defendants claim the contract was not enforceable as a contract of sale, and that there was an accord and satisfaction.

The contract provides that the purchasers, naming them, "hereby agree to purchase at the price of \$35,000" defendants' real estate described therein, and that defendants "agree to sell said premises at said price and to convey to said purchaser a good and merchantable title thereto, by contract for a general warranty deed," subject to certain leases, taxes, assessments, party wall agreements, building restrictions of record, "and to a first mortgage to be negotiated by Tutules & Dignan on or before September 15, 1923, for no less an amount than \$16,500;" that the "purchaser" has paid \$1000 as earnest money, to be applied on the purchase when consummated, and agrees to pay within five days

THE TRUSTEES OF THE
UNIVERSITY OF CALIFORNIA
DO HEREBY CERTIFY THAT
THE FOLLOWING IS A TRUE
AND CORRECT COPY OF THE
ORIGINAL AS FILED IN THE
OFFICE OF THE CLERK OF THE
SUPREME COURT OF THE STATE
OF CALIFORNIA, AT SACRAMENTO,
THIS 10TH DAY OF JANUARY, 1901.

THE TRUSTEES OF THE
UNIVERSITY OF CALIFORNIA
DO HEREBY CERTIFY THAT
THE FOLLOWING IS A TRUE
AND CORRECT COPY OF THE
ORIGINAL AS FILED IN THE
OFFICE OF THE CLERK OF THE
SUPREME COURT OF THE STATE
OF CALIFORNIA, AT SACRAMENTO,
THIS 10TH DAY OF JANUARY, 1901.

after the title has been found good or accepted by "him," the further sum of \$4000, and to assume an existing second mortgage of \$7000; "and vendee further agrees to enter into a contract with vander for the payment of the remainder of the purchase price, amounting to \$6500," in monthly installments of \$125 or more per month with interest, to be evidenced by judgment notes; that "a certificate of title issued by the Registrar of Titles of Cook County, or complete merchantable abstract of title or merchantable copy brought down to date hereof, or merchantable title guaranty policy made by Chicago Title & Trust Co., shall be furnished by the vander within a reasonable time." The contract also provides that "should said purchaser fail to perform this contract promptly on his part at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vander, be retained by the vander as liquidated damages, and the contract shall thereupon become and be null and void;" that "time is of the essence of this contract and of all of the conditions hereof;" and that the contract and earnest money shall be held by the plaintiffs for the mutual benefit of the parties concerned.

On September 11, 1923, a supplemental written agreement was made, by which the amount of cash to be paid was increased by \$1000, the amount of the loan to be secured by plaintiff was reduced to \$15,000, due in seven years with interest at six and one-half per cent, and the time within which the "mortgage must be made" was extended from September 15, 1923, to October 1, 1923. Plaintiffs effected such a loan and defendants executed the required notes and trust deed for the same on September 29, 1923. Soon after, defendants told the plaintiffs that "now that the title was cleared up" they did not care to sell.

It was shown that the purchasers were ready, able and willing at all times to carry out their part of the contract and that plain-

It was shown that the plaintiffs were ready, willing and able to pay the amount of the loan as it came due.

and the court so held.

The bill for the plaintiffs was that the title was conveyed up

and paid for the same on September 29, 1923. Such a debt, however

cannot be a loan and defendant's answer that the plaintiff's notes and

in evidence from September 18, 1923, to October 1, 1923. Plaintiff's

bill for same, and the time within which the mortgage must be made?

was on 11, 1923. And in answer thereto with interest at six and one-

half, the amount of the loan to be secured by plaintiff was 700-

000, by which the amount of each to be paid was increased by

On September 11, 1923, a supplemental written agreement

that plaintiff at the parties' agreement.

was entered into and of all of the conditions heretofore, and that the

on account and be well and valid; that "time is of the essence of

the contract as indicated hereafter, and the mortgage shall there-

may paid as above shall, at the option of the vendor, be retained

at of the time and in the manner herein specified, and amount

shall said payment shall be given with interest payable on the

other with a reasonable time." The contract also provides that

any note by Plaintiff shall be paid as follows: shall be provided by the

by through them to their benefit, at monthlies with interest

only, or complete satisfaction of all of their obligations

withhold of title issued by the plaintiff of title at such

with title interest, as to evidenced by payment notes; that "a

amounting to \$5000," is hereby transferred at title to make pay

in vendor for the payment of the remainder of the purchase price,

title; and vendor further agrees to enter into a contract

that sum of \$5000, and to secure an existing second mortgage

and the title has been found to be conveyed to him," the

tiffs repeatedly urged defendants to perform, but that defendants refused to do so, finally claiming the contract had "expired" on October 1, 1923.

This latter claim of defendants is wholly unfounded. The only provision of the contract which mentions October 1, 1923, is the one requiring the loan to be negotiated by the plaintiffs before that date; and, in fact, the loan was secured by them before that time.

Defendants' contention that the contract was "not enforceable as a contract of purchase," is equally untenable. It is claimed that the written agreement was merely an agreement for a future contract, and "left unsettled many essential elements of the proposed sale." We do not so read the contract. It expressly provides that the purchasers "agree to purchase" defendants' property, and defendants "agree to sell" the same, for the price of \$35,000. As originally written, the purchasers agreed to take the property subject to a first mortgage to be secured for \$15,500, to assume a second mortgage of \$7000, to pay \$1000 down as earnest money, \$4000 more when the title was accepted by them, and \$6500 in monthly payments of \$125 each. The sum of these amounts is \$35,000. The supplemental agreement reduced the amount of the first mortgage to \$15,000, and increased the amount of the cash payment \$1000. These provisions cover all that is to be done by the purchasers, except to execute judgment notes for the balance payable monthly. In return for this agreement on the part of the purchasers, the sellers agreed "to sell said premises at said price," and to "convey" to the purchasers "a good and merchantable title thereto," by giving them a "contract for general warranty deed," subject to the enumerated exceptions. If this agreement had provided that a warranty deed should be given, subject as enumerated and also subject to a third mortgage for the remainder of the purchase

It is respectfully urged defendant to pay, and that defendant
may be so, finally claiming the contract was "expired" on
October 1, 1911.

This latter claim of defendant is clearly untenable.
Only provision of the contract with relation October 1, 1911,
the one requiring the loan to be repaid by the plaintiff
on that date; and, in fact, the loan was repaid by them before
a time.

Defendant's contention that the contract was "not an
absolute one of purchase," is equally untenable. It is
true that the written agreement was merely an agreement for a
loan, and not "a contract of purchase," but the essential elements of the
contract were: "It is not to be repaid the contract. It is
absolute." The purchase was "absolute" and "definite."
The purchase was "absolute" and "definite" for the price
of \$10,000. As originally written, the purchase was agreed to take
place on a first mortgage to be secured for \$10,000.
The purchase was made on the 11th of June, and \$1000 in
this payment of \$1000 each. The sum of these amounts is \$10,000.
The purchase agreement required the payment of the first mortgage
of \$10,000, and included the amount of the cash payment \$1000.
The purchase was made all that is to be done by the purchase.
The purchase was made for the balance payable monthly.
The purchase was made on the 11th of June, and the purchase, the
loan was "to be repaid as said price," and so "absolutely."
The purchase was made and repaid on the 11th of June, by
the purchase of "the purchase of the purchase of the purchase" subject to the
purchase agreement. It is not necessary to provide that a
purchase was made in given, subject to payment and also

price, payable in monthly installments, there would be no possible room for the objection now made; and defendants certainly cannot complain if the purchasers, instead of requiring defendants to give a warranty deed and take back a third mortgage to secure the balance of the purchase money, were willing and agreed to accept defendants' contract to give them a warranty deed when the purchase price was paid in full, which is the force and effect of the agreement. It is a matter of common knowledge that sales are frequently made in that manner, where mortgages are assumed by the purchaser and the remainder of the purchase price is to be paid in monthly installments. It is a convenient method of securing such payments, without requiring second or third mortgages to be made. The sale is effected, however, when the contract of sale is executed. None of the essential elements of a contract of sale are omitted from the contract in evidence, and it was a binding and enforceable contract. It purports to be, and is, in fact, a contract of purchase and sale, and, under the familiar rule, plaintiffs earned their commission when it was executed by defendants.

We are not impressed with defendants' argument as to the alleged accord and satisfaction by the payment of about \$1100 to plaintiffs by defendants. If plaintiffs' evidence is to be believed, there was no payment of commissions at any time, but only a repayment to plaintiffs of moneys which they actually advanced to secure the loan and to pay escrow and recording fees. While there is some evidence apparently to the contrary, the trial judge saw and heard the witnesses and believed this evidence of the plaintiffs. We find nothing in the record which would justify us in holding that his conclusion was manifestly against the weight of the evidence.

The judgment is affirmed.

AFFIRMED.

arnes, P.J., and Gridley, J., concur.

[illegible]

7451.
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 635²

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Marietta Bazeley,
Appellant,

vs.

Appeal from
Winnebago
County.

The Estate of David Schoonmaker,
Appellee.

238 I.A. 635

Jones, J.

Marietta Bazeley, the appellant, filed a claim in the county court of Winnebago County against the estate of David Schoonmaker, deceased, for services rendered decedent from September 12th, 1916 to April 12th, 1920, being 186 weeks at \$10 per week, and from April 12th, 1920 to September 12th, 1921, being 74 weeks at \$15 per week. The total amount of the claim was \$2970 on which was credited as paid, the sum of \$1040, leaving a balance of \$1930.

The claim was disallowed in the probate court. An appeal was taken to the circuit court where the cause was tried before a jury. At the conclusion of all the evidence offered on behalf of the claimant, the court gave a peremptory instruction to the jury to find the issues in favor of the defendant. After the return of the verdict a motion for a new trial was made and overruled and judgment was entered upon the verdict. An appeal was then taken to this court. The only question in the case for us to consider is whether or not there was sufficient evidence offered to fairly sustain a verdict in favor of the claimant. In determining this question, we must give the testimony of claimant's witnesses the most favorable interpretation.

According to the evidence offered in behalf of claimant, she went to work at the home of David Schoonmaker in January of 1912, under an express contract with him that she was to receive for her services \$4.00 per week; that her children should have the right to make their home at the residence of Mr. Schoonmaker and were to pay him a certain charge for board. The claimant continued in the service of the decedent until his death on September 12th, 1921.

She received regular payments of \$4.00 per week during all that period of time and after the death of decedent his administrator asked her how much the decedent owed her. She replied that he owed her for about two weeks' work. The administrator then gave her a check for \$15 which he stated was the pay for the two weeks she claimed and also \$7.00 for additional services rendered after the death of decedent.

A number of witnesses testified to conversations they had had at various times with the decedent. It appears that during the world's war the claimant was offered a position at an officer's mess at the cantonment at Camp Grant and for her services she was promised \$20 or \$25 per week. She considered accepting this position and according to the various witnesses Schoonmaker stated that he could not pay her that amount of wages at that time, but if she would continue in his employment, he would make it up to her at the time of his death when he was through with his property. Lloyd Bazeley, a son of claimant, testified with reference to a conversation he had with the decedent at a time when his mother was present. Claimant introduced the subject and told of her offer at Camp Grant. Schoonmaker then said that she was going to stay with him; that he had talked with her that day; that he couldn't pay her those wages but he would make it up to her if she would stay with him and that she has said she would stay until his death. This testimony is substantially the same as that given by a number of other witnesses.

Upon a motion to direct a verdict at the close of a plaintiff's case, the motion must be overruled, if the evidence construed most favorably in behalf of the plaintiff together with the reasonable inferences to be drawn therefrom, fairly tends to support the cause of action or claim. (Blair v. I. C. R.R. Co. 243 Ill. 224). The Court cannot weigh the evidence but is required to view it in the light most favorable to plaintiff and resolve all controverted questions of fact in her favor. (Campbell v. C.R. I. & P. Ry. Co. 243 Ill. 620.) For the purpose of the motion to direct a verdict the testimony of claim-

The received regular payments of \$4.00 per week during all that

period of time and after the death of decedent his administrator

paid her how much the decedent owed her. She replied that he owed

her for about 100 weeks' work. The administrator then gave her a

check for \$10 which he stated was the pay for the 100 weeks' work.

Decedent and also \$7.00 for additional services rendered after the death

of decedent.

A number of witnesses testified to the facts that they saw

at various times with the decedent. It appears that during the period

when the decedent was offered a position as an officer's mess at the

army camp at Camp Grant and the fact that the decedent was in

the army camp. She considered accepting this position and seeing him

at the various witnesses. Schenck stated that he could not pay her

the amount of wages at that time, but she would continue in his

employment, he would make it up to her at the time of his death when

he was through with his property. Lloyd Beasley, a son of decedent,

testified with reference to a conversation he had with the decedent at

a time when his mother was present. Plaintiff introduced the subject

of her offer to him. Plaintiff introduced the subject

of her offer to stay with him; that he had talked with her that day;

that he wouldn't pay her those wages but he would make it up to her if

she would stay with him and that she had said she would stay until his

death. This testimony is substantially the same as that given by a

number of other witnesses.

Plaintiff's motion to direct a verdict at the close of a plaintiff's

evidence must be overruled, if the evidence contained most

favorably in behalf of the plaintiff together with the reasonable

evidence to be drawn therefrom, fairly tends to support the cause of

plaintiff's claim. (Blain v. I. O. R. M. Co. 248 Ill. 224). The Court

must weigh the evidence as it is presented and if it is found that

there is a plaintiff and resolve all controverted questions of fact

in favor of the plaintiff. (Campbell v. C. R. I. & P. Ry. Co. 248 Ill. 220). For

the purpose of the motion to direct a verdict the testimony of

ant's witnesses must be assumed to be true. The appellee, in this case, recognizes that rule of law, but insists that such promises even though relied upon by the claimant and acted upon by her in good faith, are nevertheless too vague and indefinite to constitute an enforceable contract. If this court were inclined to that view of the case, we would, under the holding of the Supreme Court of this state in Neish v. Gannon 198 Ill. 219, be compelled to decide adversely to appellee's contention. In that case an elderly lady took to her home her young niece, who after several years, finished school and was offered an opportunity to teach and receive higher wages than she was getting. Sometime before the aunt died she stated to Joseph Peacock that the claimant had lived with her and worked for her and that she calculated to pay her for her services. The evidence showed that about a month before the claimant was married the aunt gave her \$50 and stated that it was a part of her wages; that in July or August of 1908 the aunt gave claimant \$75 and said to her that she would give her that to apply on her wages and "that she would pay the rest when she was through with her property or when she left this world." A motion was made for a directed verdict and the Supreme Court said on page 223 of the opinion that the trial court did not err in declining to take the case from the jury. The testimony in the Neish case is so much like the testimony in this case that it leaves no room for doubt about the necessity of submitting the case at bar to a jury.

It is contended that the claimant's declaration to the administrator that there was about two weeks' pay due her at \$4.00 per week is an admission on her part that she expected nothing more as compensation for her services. This is a matter which may be properly argued to a jury but can have but little weight on the presentation of a motion for a directed verdict. Keeping in mind the rule of law which requires the court, when hearing such a motion, to put the ~~motion~~ most favorable construction on the testimony on behalf of a claimant, it cannot be said that her statement is inconsistent with her claim or that she did not implicitly rely on the promise decedent had given her that he would make provision for the payment of addition-

The court was divided 4 to 3 in favor of the plaintiff. The majority opinion was written by Justice Brandeis and was joined by Justices Holmes, Brandeis, and Clegg. Justice Brandeis stated that the plaintiff's evidence was sufficient to establish that the defendant was negligent. The court awarded damages to the plaintiff.

al compensation out of his property when he was through with it, by a last will or otherwise. We do not say that decedent made such a promise. We simply say that it is our duty to give to the testimony any reasonable inference favorable to the claimant, and if by doing so the case can be submitted to a jury, it should be so submitted.

We are therefore constrained to reverse and remand this case.

Reversed and Remanded.

of experimental work of this nature, which is now being done, by a
large staff of observers. We do not say that the results will be
positive. We simply say that it is very likely to be so. The
very thorough and extensive investigation of the subject, and of the
the same can be said to be a long, it would be so. The
We are therefore confident that the results will be positive.

... ..

22

STATE OF ILLINOIS, {
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-nine

Justus L. Johnson
Clerk of the Appellate Court.

4496a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 635³

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Ellen M. Talty,

appellee,

vs.

Frank Schoenholz, Sheriff of
the County of Lee,

appellant,

entirely allowed

Appeal from the Circuit Court
of Lee County.

233 I.A. 635

Jones J.

On December 8th, 1920, the appellee Ellen M. Talty, filed a suit in replevin against the appellant Frank Schoenholz, Sheriff of Lee County, to recover the possession of certain personal property which the appellant as such Sheriff had levied upon by virtue of an execution issued out of the circuit court of that county, upon a judgment in favor of the State Bank of Sterling and against P. F. Talty and E. F. Talty. The appellee claimed the right to the possession of the property by virtue of the lien of a chattel mortgage executed by P. F. Talty conveying the property to her. There was a trial in the circuit court and a judgment in favor of the appellant. The appellee brought the case to this court. It is reported in 224 Ill. App. at page 158. This court reversed the judgment and remanded the cause to the circuit court of Lee County for a new trial. Upon the reinstatement of the cause in that court, the parties entered into a stipulation waiving trial by jury and consenting to a trial before the court upon the evidence introduced at the first trial, reserving to the parties full rights to make objection to the competency of the evidence and to submit propositions of law. The court rendered a judgment awarding all property covered by the chattel mortgage to the appellee and ordering a return of some property not in the mortgage to the appellant.

Reference is here made to our former opinion for a full statement of the facts. Upon the trial, the appellant submitted seventeen propositions of law to the court for its ruling. The

Ellen M. Talty,

Appellee,

vs.

Frank Schoenholz, Sheriff of

the County of Lee,

Appellant,

of Lee County.

Appeal from the Circuit Court

233 I.A. 635

Jones J.

On December 8th, 1930, the appellee Ellen M. Talty, filed

a writ in replevin against the appellant Frank Schoenholz,

Sheriff of Lee County, to recover the possession of certain

personal property which the appellant as such Sheriff had levied

upon by virtue of an execution issued out of the circuit court of

that county, upon a judgment in favor of the State Bank of Ste-

line and against P. P. Talty and E. P. Talty. The appellee claim-

ed the right to the possession of the property by virtue of the

lien of a chattel mortgage executed by P. P. Talty conveying the

property to her. There was a trial in the circuit court and a

judgment in favor of the appellant. The appellee brought the

case to this court. It is reported in 224 Ill. App. at page

158. This court reversed the judgment and remanded the cause

to the circuit court of Lee County for a new trial. Upon the

reinstatement of the cause in that court, the parties entered into

a stipulation waiving trial by jury and consenting to a trial

before the court upon the evidence introduced at the first trial,

reserving to the parties full rights to make objection to the

competency of the evidence and to submit propositions of law.

The court rendered a judgment awarding all property covered by

the chattel mortgage to the appellee and ordering a return of

some property not in the mortgage to the appellant.

Reference is here made to our former opinion for a full

statement of the facts. Upon the trial, the appellant submitted

seventeen propositions of law to the court for its ruling. The

court denied all of them as presented, but modified number ten and held it to be the law, as modified. The propositions submitted presented the case to the court upon the theory upon which it was argued in this court upon the first appeal. Counsel for appellant admit that every proposition raised in their briefs on this appeal was argued on the former appeal, except proposition number nine. It is that the judgment, insofar as it ordered the return of the replevined property to the defendant, should have contained a provision that in default of such return by a short day to have been fixed by the court, the plaintiff should pay the amount of the execution upon which such property was taken by the defendant. The value of the property so withheld would be the measure of the damages in a suit upon plaintiff's bond for a recovery in case of such default. The court did not err ~~the~~ in that particular.

We respect to all other propositions our holding on the former case is binding not only upon the trial court but upon this court as well in a subsequent appeal where the evidence shows the facts to be the same. (C.C.C. & St. L. Ry. Co. v. Alfred, 123 Ill. App. 477; C. & A. R. R. Co. v. Kelly, 182 Ill. 267.)

For the reasons given the judgment of the lower court will be affirmed.

Judgment affirmed.

could denied all of them as presented, but admitted number ten
and held it to be the law, as admitted. The proposition sub-
mitted presented the case to the court upon the theory upon which
it was argued in this court upon the first appeal. Counsel for
appellant admit that every proposition raised in their briefs
on this appeal was argued on the former appeal, except proposi-
tion number nine. It is that the judgment, insofar as it relates
the return of the realty property to the defendant, should
have contained a provision that in default of such return by a
short day to have been fixed by the court, the plaintiff should
pay the amount of the execution upon which such property was
taken by the defendant. The value of the property as withheld
would be the measure of the damages in a suit upon plaintiff's
bond for a recovery in case of such default. The court did not
err in that particular.

We respect to all other propositions our holding on the
former case is binding not only upon the trial court but upon
this court as well in a subsequent appeal where the evidence shows
the facts to be the same. (O.G.C. & St. L. Ry. Co. v. Afford,
123 Ill. App. 477; O. & A. R. Co. v. Kelly, 182 Ill. 267.)
For the reasons given the judgment of the lower court will
be affirmed.

Judgment affirmed.

Reinstatement of the cause in that court.

A stipulation between trial by jury and evidence.

Before the court upon the evidence.

Competency of the evidence and its

weight rendered a judgment according to the

weight of the evidence.

Verdict.

TO THE COURT.

THE COURT.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

7413
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 635⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Standard Oil Company of Indiana,
a Corporation, Appellee,

vs.

Cornelius C. Vanderboom, et al,
Appellant.

Appeal from

Will County.

Jones J.

238 I.A. 635

The questions involved in this case are those which are involved in the case of Acker v. Vanderboom, et al, General No. 7414, Agenda No. 39 of this term and the opinion of this court in that case is controlling in this one. The decree herein is therefore affirmed.

Decree Affirmed.

Standard Oil Company of Indiana
Appellants

Respondents

vs.

Commissioner of Taxation, et al.
Appellees

1111

23814.035

Page 1

The questions involved in this case are those which are
involved in the case of *Robert C. Thompson, et al. v. Standard
Oil Co.*, which is now pending in the Supreme Court of the
United States. It is not necessary in this case to decide
whether the case is controlling in this case. The decree
is inoperative.

THOMAS L. SMITH

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twelve.

Justus L. Johnson
Clerk of the Appellate Court.

J. JUSTUS L. JOHNSON, Clerk of
the State of Illinois, and keeper of the Record
The

Deceiving denied April 28, 1925.

7421

14498a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 635⁵

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Numbered

and District of the

Agenda No. 44

General No. 7421

Samuel Jaffe, Appellant

vs.

H. L. Miller, et al, Appellees

Appeal from Cir-
cuit Court of Kan-
kakee County

238 I.A. 635

Jones J:

The appellant Samuel Jaffe, for a period of fifteen years prior to July 1st, 1919, was a wholesaler of beer at Chicago Heights and handled the product of the Independent Brewing Association of Chicago. When prohibition laws went into effect, the Brewing Association changed its name to "Primalt Products Company." Appellant had been doing business for the Brewing Association under a contract which contemplated only the sale of beer. This contract was dated September 26th, 1914, and by its terms was to expire on September 26th, 1921. After the Brewing Association had changed its name, it manufactured and sold a non-alcoholic drink, known as "Prima Tonic." No new contract was entered into between the Primalt Products Company and appellant, but the latter continued his relations with the company and engaged in the sale of Prima Tonic at Chicago Heights and other cities and towns in that vicinity among which was the city of Kankakee.

On March 25th, 1921, appellees H. L. Miller and N. A. Drendel, partners doing business under the firm name of Miller & Drendel, were engaged as wholesale distributors of non-alcoholic drinks in Kankakee. They were aware of the beverage known as Prima Tonic, where it was made, and that appellant, Jaffe, was a distributor. They went to him and negotiated for the right to sell Prima Tonic in the Kankakee territory. As a result of this negotiation, appellant and appellee, Miller, went to an attorney's office, where a contract was drawn. By this contract appellant conveyed to appellees the right to sell said products in the Kankakee territory, from April 1st, 1921 to December 31st, 1922. The consideration to be paid to appellant was ten cents for each case handled by appellees. All orders from a pellee were to be placed

General No. 7481

Appeal from Circuit Court of Kane County
Kane County

2381 A. 635

Samuel Jaffe, Appellant
vs.
E. L. Miller, et al., Appellees

Issue 1:

The appellant Samuel Jaffe, for a period of fifteen years after to July 1st, 1919, was a wholesaler of beer at Chicago Heights and handled the product of the Independent Brewing Association of Chicago. When prohibition laws went into effect, the Brewing Association changed its name to "Prime's Prostate Company." Appellant had been doing business for the Brewing Association under a contract which contemplated only the sale of beer. This contract was dated September 28th, 1914, and by its terms was to expire on September 28th, 1921. After the Brewing Association had changed its name, it manufactured and sold a non-alcoholic drink, known as "Prime Tonic." A new contract was entered into between the Prime's Prostate Company and appellant, but the latter continued his business with the appellant and appellant in the sale of Prime Tonic at Chicago Heights and other cities and towns in that vicinity, even when the city of Chicago.

On March 28th, 1921, appellant E. L. Miller and W. L. Crowder, partners in the business with the appellant, were informed that appellant was manufacturing a non-alcoholic drink in Chicago. They were aware of the beverage known as Prime Tonic, where it was sold and distributed. Jaffe, was a distributor. They went to him and negotiated for the right to sell Prime Tonic in the Kane County territory as a result of this negotiation, appellant and appellant, Miller, went to an attorney's office, where a contract was drawn. By this contract appellant agreed to appellees the right to sell said products in the Kane County territory, from April 1st, 1921 to December 31st, 1923. The

provided that it should be accepted by that company. In order to procure the acceptance of the contract by the company, the parties agreed to meet at the office of the company on a certain day thereafter. Appellee Miller, on behalf of his firm went to the office of the company at the appointed time, but Jaffe did not appear. Miller made the officers of the company aware of his business there and of the execution of the contract between his firm and Jaffe. According to the testimony of Miller and of Peter E. Arnolds, the sales manager for the company, Miller was told by Arnolds that Jaffe was not an agent of the company, that he was only a buyer and a distributor, that he had no definite territory in which to sell Prima Tonic, that he had no rights whatever in the Kankakee territory and had no power to convey any right to sell Prima Tonic in that territory. Thereupon Miller, on behalf of his firm, entered into an arrangement with the company for the right to sell Prima Tonic in Kankakee and vicinity.

Appellant went to Kankakee in August 1921 and went to the office of appellees. He there met Miller and told him he had come for the purpose of getting a settlement. Jaffe testified that Miller refused to make any settlement on the ground that Jaffe had violated their contract by selling 130 cases of Prima Tonic in Kankakee territory, and that he had cut the price ten cents per case thereon. Jaffe further testified that Miller also refused to make a settlement because he claimed the term of the contract was erroneously stated therein as December 31st, 1922 instead of December 31st, 1921.

Upon a refusal of appellees to make a settlement with appellant, the latter filed a bill for discovery and an accounting and prayed for judgment of ten cents per case on all Prima Tonic sold by appellees as provided in said contract. Appellees filed a sworn plea and answer. The answer set up substantially the same matters as the plea, to-wit: that the contract had been entered into but on account of a stenographic error, the expiration period was placed at December 31st, 1922 instead of December 31st, 1921; that in August 1921, at the meeting between Jaffe and Miller, the former consented to correct the mistake

testified that it should be accepted by that company. In order to
prevent the acceptance of the contract by the company, the parties
agreed to wait until the office of the company on a certain day
testified. Appellee Miller, on behalf of his firm went to the
office of the company at the appointed time, but Jaffe did not appear.
Miller made the officers of the company aware of his business there
and of the execution of the contract between his firm and Jaffe.
According to the testimony of Miller and of Peter H. Arnold, the
other manager for the company, Miller was told by Arnold that Jaffe
was not a agent of the company, that he was only a buyer and a
responsible, that he had no definite territory in which to sell wine
and that he had no rights whatever in the Kansas territory and
had no power to convey any right to sell wine there in that territory.
Miller, on behalf of his firm, entered into an arrangement
with the company for the right to sell wine there in Kansas and
Arkansas.
Miller went to Kansas in August 1901 and went to the office
of appellee. He there met Miller and told him he had come for the
purpose of getting a settlement. Jaffe testified that Miller refused
to make any settlement on the ground that Jaffe had violated their
contract by selling 150 cases of wine there in Kansas territory, and
that he had not the price ten cents per case thereon. Jaffe further
testified that Miller also refused to make a settlement because he
disputed the term of the contract was erroneously stated therein as
December 31st, 1901 instead of December 31st, 1902.
Upon a refusal of appellee to make a settlement with appellant,
the latter filed a bill for discovery and an accounting and prayed for
payment of ten cents per case on all wine there sold by appellee
as testified in said contract. Appellee filed a sworn plea and answer
the answer setting substantially the same matters as the plea, to-wit:
his error, the expiration period was placed at December 31st, 1902

in said contract by changing the date therein from 1922 to 1921; that at the time said contract was entered into appellant had no exclusive right of sale of Prima Tonic in the Kankakee territory as he represented to have; that the Primalt Products Company refused to accept the contract entered into between appellant and appellees; that appellees never acted under their said contract with Jaffe, but entered into a separate and independent agreement with the Primalt Products Company; and that after the contract with appellant had been entered into, he violated the same by selling a large number of cases of Prima Tonic in the Kankakee territory on which the defendants, had they sold such Prima Tonic, would have received a commission of sixty cents a case. The appellant filed a general replication to said plea and answer, and after a hearing, the court entered a decree dismissing the bill for want of equity.

Because of the view we take of the appellant's right to recover, it is unnecessary for us to discuss the effect of the sworn plea and answer in this case. We have purposed to decide the case upon what appears to us to be its merits rather than upon any technical question.

It is quite evident to us that Jaffe had no exclusive right of territory to sell and convey to Miller and Drendel. It is true that he claims to have had some oral agreement with the Primalt Products Company giving him such a right, but after a careful examination of the record we conclude that his claim is not consistent with the undisputed and established facts and circumstances.

Jaffe continued his relationship with the ~~company~~ company under his original contract and the company also seemed to act under it, although it had changed its name and the character of its product. We are inclined to the belief that the contract between Jaffe and the Primalt Products Company was so treated by each of them that equity would enforce it so far as it was capable of being enforced under the circumstances. By its terms it was to terminate on September 26, 1921. But Jaffe's contract with appellees was not to terminate

[illegible]

until December 31st, 1922, or if a stenographic error was made, then on December 31st, 1921. Either date was beyond the one on which Jaffe's contract with the company would terminate. There is nothing in his contract with the company, which either expressly or impliedly gave to him the exclusive right of sale in Kankakee and vicinity, or any right to convey such a privilege. Certainly it ought not to be contended that he had any right to convey an exclusive privilege of selling in that territory for a period of time which extended far beyond the termination date of his own contract.

That he recognized this situation himself is at least indicated by his failure to endeavor to have his contract with appellees accepted by the Primalt Products Company and by his failure to meet Miller at the office of the company at an appointed time. He appears not to have communicated with the company upon the subject of this contract or with appellees with respect to their agreement with him for a period of five months after the agreement was entered into. His son, who is engaged in the sale of Prima Tonic for appellant took no notice of the alleged contract with appellees and sold a large quantity of Prima Tonic in the Kankakee territory.

On the other hand appellees seem to have acted in perfect good faith in the matter. As long as they believed Jaffe had power to convey a right they dealt with him, but when they were definitely assured that he possessed no such right, they dealt with the company directly. We therefore conclude that Jaffe was without power to convey any right of sale to appellees; that the alleged contract between appellant and appellees never became effective and that appellant was not entitled to the relief or any part thereof as prayed in his said bill. The decree of the circuit court is therefore affirmed.

Decree Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson

W. L. JOHNSON

7427

AT A TERM OF THE APPELLATE COURT

Begin and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

- Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

238 I.A. 636¹

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

APPELLATE COURT

our and one thousand nine hundred
thirty of 1934

to wit: On

thirty of the Court was filed in the

Court in the words and figures

Edith Calvert, Appellee,

vs.

Appeal from
County Court
of Peoria County.Block & Kuhl Co., a corporation,
Appellant.

233 I.A. 636

Jones J:

The appellee, Edith Calvert, is a designer of certain garments for children and women. She recovered a judgment in assumpsit against appellee for \$400 from which an appeal was taken to this court.

The declaration consisted of a special count and the consolidated common counts. The special count averred that on November 17, 1920, the said company employed appellee as a designer, manufacturer and saleswoman for a period of one year from that date, at a salary of Forty Dollars per week; that appellee immediately entered the employ of the said company and continued therein, in the discharge of her duties until April 17, 1921, when she was wrongfully discharged by appellant; that at the time of her discharge and at all times thereafter until the expiration of the time for which she was employed she was ready, willing and able to perform the duties of her employment; and that by reason of the premises, the appellant became liable to pay her the full amount of the salary agreed upon for the term of the contract after her discharge, to-wit \$1000.

The consolidated common counts were in the usual form, Attached to the declaration was an affidavit of claim which stated that "the demand of the plaintiff in the above entitled cause is for salary due from the defendant for twenty-five weeks at the rate of Forty Dollars per week and that there is due to the plaintiff from the defendant, after allowing to the defendant all just credits, deductions and set-offs One Thousand (\$1000.00) Dollars." A bill of particulars was filed, which stated that the claim sued on was as follows:- "To twenty-five weeks service at Forty (40) Dollars per week from about April 20, 1921 to about November 1, 1921 -- \$1000."

Appellant filed a plea of the general issue accompanied by an affidavit of defense, which sets forth that the appellant has a good defense on the merits to the whole of plaintiff's demand

Edith Calvert, Appellee,

Appeal from
County Court
of Peoria County.

vs.

Block & Kohl Co., a corporation,
Appellant.

James J.

2381 A. 636

The appellee, Edith Calvert, is a designer of certain garments for children and women. She recovered a judgment in assumpsit against appellee for \$400 from which an appeal was taken to this court.

The declaration consisted of a special count and the consolidated common counts. The special count averred that on November 17, 1920, the said company employed appellee as a designer, manufacturer and saleswoman for a period of one year from that date, at a salary of forty dollars per week; that appellee immediately entered the employ of the said company and continued therein, in the discharge of her duties until April 17, 1921, when she was wrongfully discharged by appellee; that at the time of her discharge and at all times thereafter until the expiration of the time for which she was employed she was ready, willing and able to perform the duties of her employment and that by reason of the discharge, the appellee became liable to pay her the full amount of the salary earned upon the basis of the contract after her discharge, to-wit: \$1000.

The consolidated common counts were in the usual form, attached to the declaration was an affidavit of claim which stated that "the amount of the plaintiff in the above entitled cause is for salary due from the defendant for twenty-five weeks at the rate of forty dollars per week and that there is due to the plaintiff from the defendant, after allowing to the defendant all 1000 dollars, \$1000.00 and one thousand (\$1000.00) dollars." A bill of particulars was filed, which stated that the claim was as was as follows: "Twenty-five weeks salary at forty (\$40) dollars per week from March 17, 1921 to about November 1, 1921 - \$1000."

Appellant filed a plea of the general issue, demurred to and

"and that the nature of such defense is as follows: that the defendant did not employ the plaintiff for a period of one year; that the defendant did not discharge the plaintiff without reasonable cause; and that said plaintiff rendered no services to the defendant for which the plaintiff has not been fully paid." With the pleadings in this condition, the cause went to trial and resulted in the above mentioned judgment in favor of the plaintiff.

The evidence showed that appellee was paid in full for all services rendered prior to the date of her discharge. In her testimony she stated that she was dismissed from service by appellant who told her that a Mr. Brandow, who had been engaged in making aprons and house dresses, had convinced the firm that the garments made by appellee were too well made and that under his management and direction he could turn the factory into a "gold mine," and that therefore it had been decided to employ Mr. Brandow to take charge of the factory. Mr. H. H. Block, one of the stockholders in the Block & Kuhl Co., was the only witness who testified for the appellant. He did not deny that he discharged appellee, but claimed that appellee's employment was not for a definite period. He attempted to justify his action in discharging her by offering objections to the character and quality of her work. He stated that her cutting was irregular; that garments did not conform to the size labels; that merchandise had been returned because of such defects; and that her work added to the expenses of the company and injured its standing.

It is contended by appellant that a discharged employee cannot maintain an action for wages or salary, covering a period following the discharge, but the action must be one for breach of contract; that neither the bill of particulars nor the affidavit of plaintiff's claim make any reference whatever to the cause of action set out in the special count, but in substance state that the action is for salary due from the defendant for twenty-five weeks at the rate of Forty Dollars per week; that she is limited by her claim made in the affidavit and bill of particulars; that the evidence shows that

"and that the nature of such defense is as follows: that the defendant did not employ the plaintiff for a period of one year; that the defendant did not discharge the plaintiff without reasonable cause; and that said plaintiff worked for defendant in the defendant for which the plaintiff has not been fully paid." With the plaintiff in this condition, the case went to trial and resulted in the above mentioned judgment in favor of the plaintiff.

The evidence showed that appellee was paid in full for all services rendered prior to the date of her discharge. In her testimony she stated that she was dismissed from service by appellant who told her that a Mr. Brandow, who had been engaged in making signs and house signs, had convinced the firm that the garments made by appellee were too well made and that under his management and direction he would turn the factory into a "gold mine," and that therefore it had been decided to employ Mr. Brandow to take charge of the factory. Mr. E. K. Black, one of the stockholders in the Black & Kohl Co., was the only witness who testified for the appellant. He did not deny that he discharged appellee, but claimed that appellee's employment was not for a definite period. He attempted to justify his action in discharging her by offering evidence to the effect that her cutting was irregular; that garments did not conform to the size labels; that merchandise had been returned because of such defects; and that her work added to the expenses of the company and injured its standing.

It is contended by appellant that a discharged employee cannot maintain an action for wages or salary, covering a period following the discharge, but the action must be one for breach of contract; that neither the bill of particulars nor the affidavit of plaintiff's claim was any reference whatever to the cause of action set out in the special count, but in substance state that the action is for salary for the defendant for twenty-five weeks at the rate of

there can be no recovery under the pleadings in this case.

Appellant relies on Reddig v. Looney 208 Ill. App. 413 and other cases holding that a plaintiff can recover only on a cause of action set forth in his affidavit of claim and then only if he has an appropriate declaration on that cause of action.

The rule of law announced in such cases is a settled one in this state and could have been successfully invoked by appellant during the trial if it had chosen to do so. But it elected to file an affidavit in which it set forth the nature of its defense, and the statement of such defense expressly took issue with the averments contained in the first count of the declaration by admitting the discharge and denying that the term of employment was for one year or any other definite period of time and also denying that appellee was discharged without cause.

While the testimony of appellee was being taken appellant made frequent objection to questions propounded to her about her discharge and the cause of it. Such objections were on the ground of incompetency, irrelevancy and immateriality. If the basis of the objections was that such proof related to matters not within the scope of the affidavit of claim or the bill of particulars, neither the court nor appellee was advised of such fact. And we conclude that such was not the basis of the objections, because the witness Block was examined and testified fully as to all matters averred in the special count of the declaration. He gave his version of the term of the contract of employment and of the things claimed by him as justifying the discharge of appellee from employment.

Under this situation, we feel that it would be decidedly wrong to reverse the judgment in this case upon technical grounds. A party to a suit cannot try a case upon a theory of his own selection, and then in the event of defeat, claim advantage of a technical error. If at the time the objections were made or at the time the motions to direct a verdict were presented appellant had made known the real ground of its objections, appellee would have been given an opportunity to amend her pleadings and the court would have been

there can be no recovery under the pleadings in this case.

Appellant relies on *Hedding v. Hooney*, 208 Ill. App. 413 and

other cases holding that a plaintiff can recover only on a cause

of action set forth in his petition or in an amended petition.

He has no evidence to show that he was injured.

The fact that he was injured is not a cause of action.

There are no facts in the case to show that he was injured.

and that it had been chosen to do so. But it elected to file an

affidavit in which it set forth the nature of its defense, and the

affidavit of a defense expressly took issue with the statements

contained in the first count of the declaration by admitting the

allegation and denying that the fact of negligence was the cause

of any other alleged injury of him and also denying that negligence

was the cause of his injury.

While the liability of appellee was being taken appellant

was frequent objection to questions propounded to her about her

allegation and the cause of it. Such objections were on the ground

of immateriality, irrelevancy and immateriality. If the basis of the

objection was that such questions were immaterial to the case

of the liability of appellant or the bill of particulars, neither the court

nor appellee was advised of such fact. And we conclude that such was

the basis of the objections, because the witness Dixon was

examined and testified fully as to all matters averred in the special

verdict of the local station. He gave his version of the facts of the

contract of employment and of the things claimed by him as justifying

the discharge of appellee from employment.

Under this situation, we feel that it would be decidedly wrong

to reverse the judgment in this case upon technical grounds. A

party to a suit cannot try a case upon a theory of his own selection,

and then in the event of defeat, claim advantage of a technical error.

If at the time the objections were made or at the time the motion

to direct a verdict was presented appellant had made known the

held that objections which are of a character to be cured or obviated must be specifically made at the trial and if not so made, are waived. (Helmuth v. Bell 150 Ill. 263; Payne v. Village of South Springfield, 161 Ill. 285; Illinois Central Railroad Co. v. Noyes 252 Ill. 178.)

The special count of the declaration, the affidavit of defense filed by appellant, the testimony offered by the respective parties and the attitude and conduct of the counsel throughout the trial show conclusively that all parties concerned considered that one of the issues properly triable was that which was presented by the special count. In the case of Logan v. Mutual Life Insurance Co., 293 Ill. on page 513, of the opinion it is said:- "If as we think, the record warrants us to infer, the case was tried by both parties under the impression that a verified plea was not necessary to render the testimony of the plaintiff competent. Plaintiff should not, after judgment, be permitted to change her position. If her counsel knew or believed defendant's evidence was incompetent, because no verified plea was on file setting up the defense, they should have made that specific objection when the proof was offered."

In Probst Construction Company of Chicago v. Foley 166 Ill. 31, it is said that: "In order to raise the question of variance, it was necessary for the defendant to indicate specifically the variance and point out in what it consisted, so as to enable the Court to pass upon the question intelligently, and also to enable the plaintiff to so amend his pleadings as to make it conform to the evidence."

Other alleged errors are presented to us for consideration but our ultimate conclusion makes it unnecessary for us to discuss them. This cause has been presented to two juries on the same pleadings. In both instances a verdict was returned for appellee and under all the circumstances we are inclined to think that substantial justice has been done.

Judgment Affirmed.

...of a character to be cured or
...made at the trial and it was as
...Bell 150 Ill. 283; Payne v. Wilson
...Ill. 283; Illinois Central Railroad Co.
...Ill. 178.)
...the affidavit of defense
...the testimony offered by the respective parties
...and the attitude and conduct of the counsel throughout the trial
...that all parties concerned considered that one of
...the issues properly triable was that which was presented by the
...In the case of *Hogan v. Mutual Life Insurance Co.*,
...of the opinion it is said: "It is as we
...the case was tried by both
...various under the impression that a verified plea was not necessary
...the testimony of the plaintiff's counsel. Plaintiff should
...not, after judgment, be permitted to change her position. It has
...evidence was inconsistent, but
...on the setting up the defense, they
...that specific objection when the proof was offered."
...In *Probst Construction Company of Chicago v. Foley* 156 Ill. 21,
...it is said that: "In order to raise the question of variance, it
...for the defendant to indicate specifically the variance
...and point out in what it consisted, so as to enable the Court to
...the question intelligently, and also to enable the plaintiff
...to know the character of the defense as it appears in the pleadings."
...Other alleged errors are presented to us for consideration but
...our minute examination makes it unnecessary for us to discuss them.
...This case has been presented to two juries on the same pleadings.
...In both instances a verdict was returned for appellee and under all
...the circumstances we are inclined to think that substantial justice

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS W. JOHNSON, Clerk
Sole of Hibernia, and keeper of the
of the opinion of the

7394

4507a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 636²

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

stays, on Tuesday, the seventh day of
thousand nine hundred
within and for the Second District.

THOMAS M. JETT, Presiding Jus
NORMAN JONES,

opinion of the
Court, in the year and

Cecelia Lang,
Appellant,

vs

Appeal from the Circuit Court
of Jo Daviess County.

August Lang, Administrator
of the estate of Ellen Lang,
deceased, et. al.,
Appellees,

238 I.A. 636

Partlow, J.

The Circuit Court of Jo Daviess county, upon motion of appellees, dismissed the appeal of appellant from a judgment of the county court of that county and this appeal was prosecuted.

Ellen Lang died intestate, leaving Cecelia Lang, Catherine Weich, Mary Hilkin, her daughters, and August Lang and Henry Lang, her sons, surviving her. August Lang was appointed administrator. Jacob Hilkin filed a claim against the estate for \$841.01, which was allowed sixth class. Appellant, Cecelia Lang was allowed \$500.00 as a child's award, and she filed a claim for \$1388.48, which was allowed by the administrator third class. The administrator filed a petition to sell real estate to pay debts, there being no personal estate. Appellees, who were the heirs, were served with summons upon the petition, and Jacob Hilkin and Mary Hilkin made oral objection to the allowance of the claim of appellant. On July 12, 1923, there was a hearing on the claim and the court allowed \$388.48, and refused to allow \$1000.00 which was for the care and nursing of the deceased during her last illness. Appellant appealed to the circuit court of Jo Daviess county. On July 19, 1923, the county court entered a decree for the sale of the real estate finding there was a deficiency of \$1729.49 for claims allowed, the costs of court, and the claim of \$1000.00 pending on appeal in the circuit court. On November 21, 1923, there was a trial by a jury in the circuit court. The jury returned a verdict in favor of appellant for \$1000.00. A motion for a new trial was made. The court granted the motion for a new trial. At the February term, 1924, appellees

Appeal from the Circuit Court
of DeWitt County.

Georgie Lang,
Appellant,
vs
August Lang, Administrator
of the estate of Ellen Lang,
Respondent, et al.,
Appellees.

288 I. A. 686

Section 3.

The Circuit Court of DeWitt County, upon motion of appellant, dismissed the appeal of appellant from a judgment of the county court in that county and this appeal was prosecuted.

Ellen Lang died intestate, leaving Georgie Lang, daughter, and Mary Eliza, her daughter, and August Lang and Henry Lang, her sons. August Lang was appointed administrator. Jacob Lang filed a claim against the estate for \$241.01, which was allowed. Georgie Lang was appointed administrator. She filed a claim for \$138.48, which was allowed by the administrator. The administrator filed a petition to sell real estate to pay debts, there being no personal estate. Appellees, who were the heirs, were named with August Lang as petitioners, and Mary Eliza and Henry Lang were named as respondents in the petition of appeal. On July 18, 1912, there was a hearing on the petition and the court allowed \$238.48, and returned to said \$238.48. On July 18, 1912, the court and ordering of the court was set aside. On July 18, 1912, the county court entered a decree for the sale of the real estate finding there was a deficiency of \$238.48 for claims allowed. On appeal, the claim for \$138.48 was found to be correct. On November 11, 1912, there was a trial in the circuit court. The jury returned a verdict in favor of appellant.

moved to dismiss the appeal upon the ground that the court was without jurisdiction, the motion was allowed, the appeal was dismissed, and this appeal was perfected.

It is claimed by appellees that this was a proceeding to sell real estate to pay debts and that an appeal from the decree of the county court was not to the circuit court but was to the Appellate Court of the Supreme Court; that in such a proceeding an appeal will not lie from a portion of the decree but it must be from the entire decree; that the finding of the county court disallowing the claim of appellant was a part of the decree of sale of real estate to pay debts, and that no appeal could be taken from one finding in that decree to the circuit court, and an appeal from the remainder of the decree to the Appellate Court; that if the appeal does not lie to the circuit court then the doctrine that jurisdiction over the subject matter cannot be conferred by consent of the parties, applies in this case, and the circuit court had no jurisdiction of the appeal and for that reason it was properly dismissed.

Appellant contends that section ninety-nine of the administration act confers jurisdiction upon both the county court and the circuit court to enter a decree upon a petition to sell real estate to pay debts; that appellees appeared in the circuit court upon this appeal, submitted themselves to the jurisdiction of the court, went to trial, and for that reason they could not later question the jurisdiction of the circuit court. Authorities are cited which appellant contends support this position.

Section sixty-eight of the administration act provides that in all cases of the allowance or rejection of a claim by the county court, either party may take an appeal to the circuit court at the same time and in the same manner as appeals are taken from justices of the peace to the circuit court. Under this section it has been held that appeals in cases of the allowance or rejection of claims against an estate must be taken to the circuit court. *Grier vs. Cable*, 159 Ill. 29. An appeal from a decree of the county court upon a petition to sell real estate to pay debts does not lie to the circuit

moved to dismiss the appeal upon the ground that the court was without jurisdiction, the motion was allowed, the appeal was dismissed, and his appeal was reversed.

It is claimed by appellants that this was a proceeding to sell real estate to pay debts and that an appeal from the decree of the county court was not to the circuit court but to the appellate court of the Supreme Court; that in such a proceeding an appeal will not lie from a portion of the decree but it must be from the entire decree; that the finding of the county court respecting the rights of appellants was a part of the decree of sale of real estate to pay debts, and that an appeal could be taken from the finding as well as from the decree, and an appeal from the remainder of the decree to the appellate court; that if the appeal does not lie to the appellate court then the doctrine that jurisdiction over the subject matter cannot be conferred by consent of the parties, applied in this case, and the circuit court had no jurisdiction of the appeal and for that reason it was reversed.

Appellant contends that section 1000 of the constitution does not confer jurisdiction upon both the county court and the circuit court to enter a decree upon a petition to sell real estate to pay debts; that appellees appeared in the circuit court upon this appeal, waived themselves to the jurisdiction of the court, went to trial, and for that reason they could not later question the jurisdiction of the circuit court. Appellants say that when appellees appeared upon this petition.

Section 1000 of the constitution provides that in all cases of the allowance or rejection of a claim by the county court, either party may take an appeal to the circuit court at the same time as the same is made or within ten days thereafter. It is the policy of the circuit court. When this section is read in connection with section 1001 of the constitution it is evident that an appeal in cases of the allowance or rejection of a claim by the county court must be taken to the circuit court.

court but must be to the Supreme Court or the Appellate Court. Lynn vs. Lynn, 160 Ill. 307; McCallum vs. Chicago Title and Trust Co. 203 Ill., 142; Swayer vs. Wiemers, 182 Ill. App. 651. Jurisdiction over the subject matter of a suit cannot be conferred by consent of the parties, is not waived by appearance, and may be raised at any time in any kind of a case. Village of Hammond vs. Leavitt, 181 Ill., 416; Town of Kingston vs. Anderson, 300 Ill. 577; Sims vs. City of Moline, 222 Ill. App. 530.

The first question for determination is whether this appeal was from the judgment of the county court disallowing the \$1000.00 claim of appellant, or whether it was from the decree of sale of the real estate to pay debts. The praeipe filed by appellant directed the county clerk "to prepare a complete record of the case, being the petition to sell real estate to pay debts." The record includes the appraisement bill, a copy of the report showing claims allowed, the petition to sell real estate to pay debts, and the decree of sale. Under this record there is no question but what the appeal was not from the judgment disallowing the \$1000.00 claim of appellant, but it was from the decree of sale. Under the authorities cited the appeal should have been to the Appellate Court.

Section ninety-nine of the administration act provides that a proceeding to sell real estate to pay debts shall be by petition in the county court or circuit court where the letters of administration are issued. In order for the circuit court to have jurisdiction it is necessary that the letters of administration shall have been issued from that court. The circuit court has no appellate jurisdiction to review a decree of the county court in a case of this kind and only has original jurisdiction under the conditions named in the statute. The appeal to the circuit court in this case was erroneous and conferred no jurisdiction even though the appellees appeared and took part in the trial.

For this reason the appeal was properly dismissed and the judgment will be affirmed.

...the court in the case of the appellant...

...the subject matter of a suit cannot be conferred by consent of the parties...

...is not waived by appearance, and may be raised at any time...

...any kind of a case. Village of Hammond vs. Leavitt, 181 Ill. 181.

...the first question for determination is whether this appeal was...

...the judgment of the county court dissolving the \$1000.00 claim...

...or whether it was from the decree of sale of the real estate...

...the proceeds to pay debts. The proceeds filed by appellant directed the...

...to prepare a complete record of the case, being the...

...the record includes a copy of the report showing claims allowed, the...

...to sell real estate to pay debts, and the decree of sale...

...this record there is no question but what the appeal was not...

...the judgment dissolving the \$1000.00 claim of appellant, but it...

...from the decree of sale. Under the authorities cited the appeal...

...will have been to the Appellate Court.

...section ninety-nine of the administration act provides that a...

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court.
n and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
he above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-nine

Justus L. Johnson
Clerk of the Appellate Court.

of the State of Illinois and
a true copy

Rehearing denied April 29, 1925.

7407

4501a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
October, in the year of our Lord one thousand nine hundred
and twenty-four, within and for the Second District of the
State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 636³

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

of one hundred one thousand nine hundred and
one for the Second District of the

M. JETT, Presiding Justice
I. JONES, Justice
US A. PARTLOW, Justice

I.A. 3367

to-wit: On
of the Court was filed in the
in the words and figures

Philip Vella, Administrator of the
Estate of Frank Vella, deceased,

Appellant,

vs.

Appeal from the
Circuit Court of
Winnebago County.

Rockford Gas-Light and Coke Com-
pany, a Corporation,

Appellee.

238 I.A. 636

Partlow, J.

Appellant Philip Vella, as administrator of the estate of Frank Vella, deceased, began suit in the circuit court of Winnebago county against appellee, Rockford Gas-Light and Coke Company, a corporation, to recover damages caused by the alleged wrongful death of appellant's intestate. There was a trial by jury, judgment for appellee, and this appeal was prosecuted.

The evidence shows that appellee was a public service corporation. On June 25, 1922, it excavated a trench for a gas main on Orange street in the city of Rockford. The excavation was ten feet north of the center of the street, was about four and one half feet deep, and about two hundred and fifty feet long. When the men quit work Saturday afternoon about 4:30, five lighted lanterns were left hanging from hooks on standards, each of which was four feet long and was six inches in the ground, leaving forty-two inches above the ground. These lanterns were filled so they would burn Saturday night and until about two o'clock on Sunday afternoon when they were refilled so they would burn during the remainder of Sunday afternoon and all of Sunday night.. All of the lanterns are claimed by appellee to have been in good condition. Each had a red glass globe which was set in an iron frame which extended to the top of the globe and flared out. There was a slip top to the frame which when pulled up went down inside the globe a quarter or a half an inch. The top and bottom of each lantern were perforated with small holes. The distance from the top of the bale to the top of the globe was eight and one-half inches.

Philip Vella, Administrator of the
Estate of Frank Vella, deceased,

Appellant,

vs.

Appeal from the
Circuit Court of
Winnebago County.

Rockford Gas-Light and Coke Com-
pany, a Corporation,

Appellee.

238 I.A. 636

Partlow, J.

Appellant Philip Vella, as administrator of the estate of Frank Vella, deceased, began suit in the circuit court of Winnebago county against appellee, Rockford Gas-Light and Coke Company, a corporation, to recover damages caused by the alleged wrongful death of appellant's intestate. There was a trial by jury, judgment for appellee, and this appeal was prosecuted.

The evidence shows that appellee was a public service corporation. On June 25, 1922, it excavated a trench for a gas main on Orange street in the city of Rockford. The excavation was ten feet north of the center of the street, was about four and one half feet deep, and about two hundred and fifty feet long. When the men quit work Saturday afternoon about 4:30, five lighted lanterns were left hanging from hooks on standards, each of which was four feet long and was six inches in the ground, leaving forty-two inches above the ground. These lanterns were filled so they would burn Saturday night and until about two o'clock on Sunday afternoon when they were refilled so they would burn during the remainder of Sunday afternoon and all of Sunday night.. All of the lanterns are claimed by appellee to have been in good condition. Each had a red glass globe which was set in an iron frame which extended to the top of the globe and flared out. There was a slip top to the frame which when pulled up went down inside the globe a quarter or a half an inch. The top and bottom of each lantern were perforated with small holes. The distance from the top of the bale to the top of the globe was eight and one-half inches.

Philip Vella lived on Orange street about 500 feet from Nelson

boulevard. His wife's mother lived in a frame house at the southeast corner of Nelson boulevard and Orange street. Vella had three children, Tony, five years old, Frank three years old, and a baby three days old. The wife of Vella was in bed with the new baby. During the week days when Vella was at work his mother-in-law looked after his wife and the children, but on Sunday, the day of the accident, Vella took care of them. Shortly after ten o'clock in the forenoon, the father fed the deceased, dressed him, and he went out on the porch to play with his brother. The father looked out several times and saw them on the porch. About five minutes after the father looked out the last time, he saw the grandmother coming to his house with Frank in her arms frightfully burned from which he died twenty-four hours later. The evidence shows this was about eleven o'clock.

Two witnesses testified they saw the accident. Vito Varpicelle, an Italian, testified the two boys were playing in the street. They went up to the lantern at the ditch and were there four or five minutes. There was quite a wind blowing from the west, and suddenly as they were playing with the lantern, Frank's clothes caught fire. Vito ran and caught the child as he started to run toward the walk.. Vito took his cap and tried to put out the fire but did not succeed. He then tore the clothes from the child and some of the flesh came off with the clothing. Vito's hands were burned so he could not work for two weeks. He started with the child to its father's house and turned it over to the grandmother. The testimony of Vito was corroborated, in the main, by Luigi Verace, who testified he saw three children playing with the light. They were around it about five minutes. He went into the house where he remained a couple of minutes, and as he came out he saw the child catch fire. The child started to run and Vito ran after him and tore his clothes off, and then the woman came and took the boy. The witness testified he went to the lamp and saw the light coming out of the top of it like smoke, that there was kerosene all over it, and that he turned the wick down.

Signe Carlson testified on behalf of appellee that at 10:20 o'clock she passed the children who were in front of their grandmother's house. "They said they got matches," and I says "you shouldn't play-

His wife's mother lived in a frame house at the southeast corner of Nelson Boulevard and Orange Street. Velia had three children, two boys and one girl, three years old, and a baby three days old. The wife of Velia was in bed with the new baby. During the week days when Velia was at work his mother-in-law looked after his wife and the children, but on Sunday, the day of the accident, Velia took care of them. Somewhat after ten o'clock in the forenoon, the father, the deceased, dressed him, and he went out on the porch to play with his brother. The father looked out several times and saw them in the yard. About five minutes after the father looked out the last time, he saw the grandmother coming to his house with Frank in her arms. He saw them from within the house, and he saw them go out of the house. He testified that two boys were playing in the street. They went to the fountain at the ditch and were there four or five minutes. When they came back, they were blowing from the west, and suddenly the boys were playing with the lantern. Frank's clothes caught fire. Velia caught the child as he started to run toward the walk. Velia took the child and tried to put out the fire but did not succeed. He then took the child from the child and some of the flesh came off with the lantern. Velia's hands were burned so he could not work for two weeks. Velia took the child to his father's house and turned it over to his father. The testimony of Vito was corroborated, in the main, by Frank's mother, who testified he saw three children playing with the lantern. They were around it about five minutes. He went into the yard and saw them a couple of minutes, and as he came out he saw the child catch fire. The child started to run and Vito ran after him and took his clothes off, and then the woman came and took the child. Velia testified he went to the lamp and saw the light going out of the top of it like smoke, that there was someone else there, and that he turned the wick down.

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Mat Martin, an employe of appellee, went to the excavation on Sunday afternoon about two o'clock. He testified he filled the lanterns so they would burn through Sunday night; that all of them were on the standards where they had been placed the night before. The globes were all right. None of the lanterns was flaring up, and none of the globes was black on the inside.

In rebuttal, Vito and Luigi testified they saw no matches at the time of the accident and did not see the children have matches. Vella testified the children were not where there were any matches, and they did not have any matches when they went out of the house. The grandmother testified the boy smelled of kerosene while he was in her arms; and shortly afterwards she went to the lantern and found kerosene over it, and something on the ground; that the globe was smoked; that one of appellee's men came about two o'clock in the afternoon and cleaned the black lantern and filled all of them. Appellee's representative denied that he cleaned the lantern, but admitted that he filled them.

The declaration consisted of one original and one additional count. The original count alleged that appellee by its servants, negligently, carelessly, and improperly left said lanterns burning during Saturday night and continued to let them burn through Sunday, and failed to extinguish them, and that deceased about eleven o'clock on Sunday left the home of his parents and went upon the public street and was attracted to said burning lantern, and to gratify his childish curiosity began playing with it and his clothing caught fire, and by reason thereof he died. The additional count is substantially the same as the original count, except, as it appears in the abstract, there is no allegation that the lantern attracted the deceased.

The appellant insists as ground for reversal that the court improperly permitted Signe Carlson to testify that the boys said they had matches, and she replied "you shouldn't play-you are liable to get hurt." Appellant insists that this evidence was not part of the res gestae, for that reason was improperly admitted, and that its

[illegible]

admission constituted reversible error. Appellant also complains of erroneous instructions. On the other hand appellee insists there was no error in any of these respects, that the lantern was not an attractive nuisance, and for that reason the judgment should be affirmed regardless of any defects in the record.

The first question we will consider is whether or not the evidence brings the appellee within the rule of an attractive nuisance. The doctrine of attractive nuisance arose out of the turn table cases. The doctrine upon which railroads have been held liable in turn table cases is 1. -That the turn table is easily accessible to children. 2. That it is peculiarly attractive to children and calculated to entice them. 3. That when set in motion it is a source of latent danger. 4. That it was left unguarded and unfastened although at slight expense it could have been guarded and fastened. 5. That the company knew that children were accustomed to play there and ought to have known the danger to them. 10 L.R.A. 1115.

In extending the doctrine announced in the turn table cases to other instruments which are likely to attract children, certain rules govern. In McDermott vs. Burke, 256 Ill., 401, on page 406, the court announced the rule as follows: "Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may, by their own instincts, be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed. Under such circumstances he would have good reason to expect that children, from their well known habits and nature, would be attracted to the dangerous thing, and its maintenance would amount to an implied invitation to them, so that they cannot be regarded as voluntary trespassers. (City of Pekin v. McMahon, 154 Ill. 141) It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises which the owner should anticipate. The dangerous thing must

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be so located as to attract them from the street or some public place where they may be expected to be. An owner would not be liable if he maintained something for his own use which might be dangerous but which would only be found by children going upon his premises as trespassers. It was on this ground that the owner of the turn-table in St. Louis, Vandalia and Terre Haute Railroad Co. v. Bell, 81 Ill. 76, was held not guilty of such want of care as would lawfully charge it with damages for the accident. In that case the turn-table was not near any public street nor in a place where the public were in the habit of passing."

Our attention has not been called to any Illinois cases where the doctrine has been extended to injuries to children caused by fire. On the contrary cases may be found where it has been held that the doctrine does not apply.

In American Advertising and Bill Posting Co. vs. Flannigan, 100 Ill. App. 452, it was held that a lessee of premises who burned paper thereon in which a child at play on the lot fell and was burned, there being nothing attractive on the lot, was not guilty of negligence, and was not liable under the doctrine of an attractive nuisance.

In Newman v. Barber Asphalt Paving Company, 190 Ill. App. 636, a wagon loaded with hot asphalt was standing on the street waiting to be unloaded. Several boys sitting on the curb were pulling out asphalt from openings in the bed of the wagon and they were rolling this asphalt into balls. The team moved forward two or three feet and the rear wheel ran over one of the boys killing him. It was held that the doctrine of attractive nuisance did not apply under the circumstances to a team and wagon or other vehicle standing or moving upon a public street.

In Szymczak v. Schillinger Bros. Co. 197 Ill. App. 584, the defendant had a lot where he melted tar. After the tar was melted it was poured into barrels and ~~allowing~~ allowed to cool. The plaintiff, who was a boy six years old living in the neighborhood, was playing on the lot with other children making tar balls. He reached into one of the barrels and burned his hand in the hot tar. It was held that

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1. The contrary cases may be found where it has been held that the doctrine has been extended to injuries to children caused by negligent supervision. See *Illinois cases* where the doctrine has not been applied. *Illinois cases* where the doctrine has not been applied.

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Several boys sitting on the curb were pulling out matches and lighting them in the bed of the wagon and they were rolling this and that. The team moved forward two or three feet and the wheel ran over one of the boys killing him. It was held that the attractive nuisance did not apply under the circumstances.

[illegible]

the barrel could not be said to possess a quality attractive to children as does a turn-table, or push car, or boards or logs floating on a pool of water, which have been held to be attractive nuisances, and that there could be no recovery in the case.

In 20 R.C. L. 95, many cases are cited in support of the following statement. "As a general proposition it seems that the danger from fire is one that every young child may be said to appreciate."

In 29 Cyc. 465, it is said:- The rule has been held not to apply to fires, electric light poles, revolving doors, wagons, railroad bridges, railroad cars, stone coping, or stock pens.

In Madden v. Boston & Maine Railroad Company, 83 Atl. 130, the Supreme Court of Massachusetts refused to apply the doctrine to a case where a six year old girl was burned from a fire on a railroad right of way. The court said: "It is argued that the fire was attractive to children and that the defendant knowing this fact ought to have anticipated that they would trespass upon its right of way to play with the fire. But this assumption is not universally true, for many children are repelled by the sight of a conflagration."

In Smith v. Illinois Central Railroad Co. 158 N. W. 546, ^(177 Iowa 743) a smouldering fire was maintained by a railroad company in a rubbish dump in the yards of the railroad company located about fifteen feet north of the sidewalk on the north side of a public street. A child, four years of age who was passing along the sidewalk, was attracted by the fire and approached too near the embankment and fell into the fire and was injured. The case was tried upon the theory that the fire constituted an attractive nuisance. The Supreme Court of Iowa held that the fire was not an attractive nuisance, and particularly emphasizes that the gist of the attractive nuisance theory is that the thing or contrivance which attracted children must be ~~not~~ left unguarded.

In Paolino vs. McKendal, 24 R. I. 432, (53 Atl.268) the owner of premises upon which children were accustomed to play started a fire. An infant of tender years was attracted by the fire and was

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burned. It was held that the owner, though he had taken no steps to keep children away, was not liable under the attractive nuisance doctrine.

In *Erickson v. Great Northern Ry. Co.* 82 Minn. 60, (84 N.W. 462) the defendant set fire to stumps and rubbish on its right of way. A child four years old went to the fire and while playing was burned and died. It was held that the doctrine of attractive nuisance should be limited to cases of attractive and dangerous machinery and to other similar cases where the danger is latent; that the defendant was not bound to exercise due care to so guard the fire on its right of way so that children entering thereon could not come in contact with the fire although induced so to do by its attractiveness.

In *Butz vs. Cavanaugh*, 137 Mo. 503 (38 S.W. 1104) a boy twelve years old went into an excavation near a street, on private property, and burned his feet in a smouldering fire. It was held that the defendant was not liable even though a city ordinance required him to fill in or enclose the excavation.

In the case at bar, appellee placed the lanterns along the line of the open ditch as a warning to the public during the night time. The only charge of negligence is that they were permitted to burn until eleven o'clock in the morning and that they attracted the deceased. We do not think, under the authorities cited, that this constituted such an act of negligence as to make appellee liable. For this reason the judgment will be affirmed.

Judgment affirmed.

It was held that the owner, though he had taken no steps to keep children away, was not liable under the attractive nuisance doctrine.

In *Winters v. Great Northern Ry. Co.*, 82 Minn. 60, 84 N.W. 200 (1900), the defendant set fire to stumps and rubbish on its right of way.

A child four years old went to the fire and while playing was killed and died. It was held that the doctrine of attractive nuisance should be limited to cases of attractive and dangerous objects and to other similar cases where the danger is latent.

The defendant was not bound to exercise due care to so guard its fire on its right of way as that children entering thereon could not come in contact with the fire although induced so to do by the attractiveness.

In *Bates v. Gavanagh*, 187 Mo. 608 (88 S.W. 1104), a boy twelve years old went into an excavation near a street, on private property, and burned his feet in a smoldering fire. It was held that the defendant was not liable even though a city ordinance required him to fill in or enclose the excavation.

In the case at bar, appellee placed the lanterns along the line of the open ditch as a warning to the public during the night time.

A only state of negligence is that they were permitted to burn all evening's lack in the morning and that they attracted the children. It is not thought, under the authorities cited, that this constituted such an act of negligence as to make appellee liable.

On this reason the judgment will be affirmed.

Judgment affirmed.

It is so ordered.

Very respectfully,
Your obedient servant,
J. H. [Name]

Attest:
[Signature]

Notary Public in and for the State of Missouri.
My commission expires [Date]

Witness my hand and seal this [Date] day of [Month], 19[Year].

Attest:
[Signature]

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

of the Appellate Court.
• Records and Seal thereof
of the said Appellate Court in

*This cause was reversed and remanded
to this Court by the Supreme Court
This opinion is modified and re-filed
by this Court as shown below.*

7768.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine
hundred and twenty-five, within and for the Second
District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. ~36

BE IT REMEMBERED, that afterwards, to-wit: On April 8,
1925, the modified opinion of the Court was re-filed in the
Clerk's office of said Court, in the words and figures follow-
ing, to-wit:

*The case of the ...
 ...
 ...*

AT A TERM OF THE SUPREME COURT,

begun and held at Chicago, on Tuesday, the seventh day of April, in the year of our Lord and thousandth nine hundred and twenty-five, with the Hon. the Chief Justice of the State of Illinois:

Present--The Hon. ROBERT L. TOWN, Associate Justice.

Hon. WILLIAM L. BENTON, Justice.

Hon. THOMAS M. SWAN, Justice.

JOHN L. ...

... ..

23811-38

... ..

Henry O. Phillabaum,
appellee,

vs.

The Lake Erie and Western
Railroad Company, a corporation,
appellant,

Appeal from the Circuit Court
of Peoria County

238 I.A. 636

Jett, R.J.

This is an appeal prosecuted from a judgment obtained by Henry O. Phillabaum, appellee, against the Lake Erie and Western Railroad Company, appellant, in the Circuit Court of Peoria County, for \$15,000.00, in an action on the case, for an injury alleged to have been sustained by appellee while in the employ of appellant.

The declaration consisted of three counts. The first count is based upon the Federal Safety Appliance Act, and alleges that appellee on the 29th day of August, 1921, was in the employ of appellant as a switchman at Kokomo, in the State of Indiana; that appellant was engaged in interstate commerce and that his duties required him to couple and uncouple cars; that it was the duty of appellant not to haul or use any cars in interstate commerce when the cars were not equipped with couplers which would couple automatically by impact; that appellant negligently, and wrongfully hauled and permitted to be used and hauled on its tracks, cars which were then and there not equipped with couplers which would couple automatically by impact, and that the couplers on said cars would not couple automatically by impact so as to avoid the necessity of men going between the ends of the cars to effect a coupling of the same; that said cars were then and there being hauled and used in interstate commerce and were loaded with shipments of interstate commerce; and that by reason of the condition

Henry O. Phillips,

Appellant,

Appeal from the Circuit Court

vs.

of Peoria County

The Lake Erie and Western

Railroad Company, a corporation,

Respondent.

238 I.A. 636

1931, 1-1.

This is an appeal presented from a judgment obtained by

Henry O. Phillips, appellant, against the Lake Erie and Western

Railroad Company, respondent, in the Circuit Court of Peoria County,

for \$12,000.00, in an action on the part, the first claim

to have been sustained by appellant as in the report of appeal.

1931.

The action was instituted at Peoria, Illinois. The first claim

is based upon the Federal Safety Appliance Act, and alleges that

appellant on the 29th day of August, 1931, was in the employ of

appellant as a switchman at Keokuk, in the State of Indiana; that

appellant was engaged in interstate commerce and that his duties

required him to couple and uncouple cars; that it was the duty

of appellant not to haul or use any cars in interstate commerce

when the cars were not equipped with couplers which would couple

automatically by impact; that appellant negligently, and wrong-

fully loaded and permitted to be used and hauled on the train,

said train were then and there not equipped with couplers which

would couple automatically by impact, and that the couplers in

said cars would not couple automatically by impact as is shown

the necessity of men going between the ends of the cars to effect

a coupling of the same; that said cars were then and there being

hauled and used in interstate commerce and were loaded with app-

of the couplers it became and was necessary for appellee to go between the ends of the cars in endeavoring to effect a coupling of the same; and that by reason thereof appellee was injured while between said cars, resulting in the amputation of his leg.

The second and third counts were based upon the Employer's Liability Act, the second charging a negligent order to remove the cars, and the third moving of the cars without any order while appellee was between them, resulting in his injury. Appellant filed a plea of the general issue. At the close of appellee's evidence, the court, on motion of appellant, withdrew the second and third counts from the consideration of the jury.

A trial was had and the jury returned a verdict for \$15,000. and judgment was entered thereon as aforesaid.

Appellee was in the employ of appellant at Kokomo, Indiana, as an extra switchman and as such was required to perform the usual duties of a switchman, such as coupling and uncoupling cars, throwing switches and giving signals to the engineer. On the day of the accident his duties required him to do work near the engine and all signals were given by him directly to the one in charge of the engine. The engineer was one J. Z. Beck and the fireman was Verna Tolle, who was an engineer but performing fireman's duties. Tolle was running the engine ~~xxx~~ as engineer at the time of the accident, having exchanged work with the regular engineer about an hour prior to the time of the injury. Tolle was an experienced engineer, however, and there is no charge in the declaration of any incompetency on his part.

The switching crew of which appellee was a member, went to work about 6:30 A.M. on the morning of the accident, doing the usual switching work of a switching crew in the yard at Kokomo, handling both loaded and empty cars. Appellee had nothing to do with the origin or destination or billing of the cars or contents and had no personal knowledge as to the origin or destination of any of the cars handled. Shortly after 11

of the couplers it became and was necessary for appellee to go between the ends of the cars in endeavoring to effect a coupling of the same; and that by reason thereof appellee was injured while between said cars, resulting in the amputation of his leg. The second and third counts were based upon the Employer's liability for the second charging a negligent order to remove the cars, and the third moving of the cars without any order, while appellee was between them, resulting in his injury. Appellant filed a plea of the general issue. At the close of appellee's evidence, the court, on motion of appellant, withdrew the second and third counts from the consideration of the jury. A trial was had and the jury returned a verdict for \$15,000. and judgment was entered thereon as aforesaid. Appellee was in the employ of appellant at Kokomo, Indiana, as an extra switchman and as such was required to perform the usual duties of a switchman, such as coupling and uncoupling cars, throwing switches and giving signals to the engineer. On the day of the accident his duties required him to go work near the engine and all signals were given by him directly to the one in charge of the engine. The accident was caused by the fact that the engineer was told by the switchman that the engine was running, while in fact it was not, and the engine was running on the main track at the time of the accident, having exchanged work with the regular engineer about one hour prior to the time of the injury. Tolle was an experienced engineer, however, and there is no charge in the declaration of any incompetency on his part. The switching crew of which appellee was a member, went to work about 8:30 A.M. on the morning of the accident, doing the usual switching work of a switching crew in the yard at Kokomo. Appellee had nothing to do with the origin or destination or billing of the cars or contents and was not personally involved in the accident.

o'clock, the foreman of the switching crew directed appellee and other members of the crew to take a T. & O.C. car from the main track to another point in the yard. The main track runs in a northerly and southerly direction and on each side of the main track there is a side track. The car to be moved was located near what is known as Havens Street and it was necessary for the engine and crew to go south on the main track from a point near the junction of appellant's tracks with the P.C.C. & St. L. R.R. some two or three blocks north of where this car was located. The engine being used was headed north and there were three cars attached to the south end of the engine. After receiving the orders to clear the main track, appellee took a position on the southeast corner of the south car attached to the engine, being a ~~E.~~ E. & W. box car. He stood in the stirrup provided for that purpose and gave the engineer a back-up signal by motioning with his right arm. The engine being headed north, Engineer Tolle was located on the east side and in a position to see appellee and observe the signals which he gave. In response to the signal given by appellee, the engineer backed the engine and cut of cars in a southerly direction down the main track toward the T. & O. C. car, to which coupling was to be made. As the cut approached the T. & O. C. car, appellee gave an easy signal by moving his hand backward and forward in front of his body, and just as the cars came together, he gave a stop signal and the engine and cut of cars were stopped, but for some reason, the coupling did not make and the T. & O. C. car moved south on the main track about a cars length.

Appellee then stepped off the stirrup from the southeast corner of the ~~E.~~ E. & ~~W.~~ car, and walked toward the T. & O. C. car which had stopped and then gave another back-up signal to the engineer which was responded to by a movement of the engine and cut of cars in a southerly direction toward the standing car. As the cut of cars neared the standing car, appellee gave a slow

of which the foreman of the switching crew directed appellee and other members of the crew to take a T. & O. C. car from the main track to another point in the yard. The main track runs in a northerly and southerly direction and on each side of the main track there is a side track. The car to be moved was located near what is known as Havana Street and it was necessary for the engine and crew to go south on the main track from a point near the junction of appellee's tracks with the T. & O. C. & St. L. R.R. some two or three blocks north of where this car was located. The engine being used was headed north and there were three cars attached to the south end of the engine. After receiving the orders to clear the main track, appellee took a position on the southeast corner of the south car attached to the engine, being a T. & O. C. box car. He stood in the stirrup provided for that purpose and gave the engineer a back-up signal by notching with his right arm. The engine being headed north, it was necessary for appellee to be located on the east side and in a position to see appellee and observe the signals which he gave. In response to the signal given by appellee, the engineer backed the engine and out of cars in a southerly direction down the main track toward the T. & O. C. car, to which coupling was to be made. As the car approached the T. & O. C. car, appellee gave an arm signal by moving his hand backward and forward in front of his head, and just as the cars came together, he gave a whip signal and the engine and out of cars were stopped, but for some reason, the coupling did not make and the T. & O. C. car moved south on the main track about a car length. Appellee then stepped off the stirrup from the southeast corner of the T. & O. C. car, and walked toward the T. & O. C. car which had stopped and then gave another back-up signal to the engineer which was responded to by a movement of the engine and out of cars in a southerly direction toward the switching crew.

signal and as they came together, a stop signal, but again the coupling did not make, and the T. & O. C. car moved south a short distance up against the head end of an extra freight train which was standing on the main track to the south of the T. & O. C. car.

Appellee then walked toward the T. & O. C. car, signalling the engineer to proceed in a southerly direction, and in response to such signal, the engine and cut of cars were moved south slowly. During this time appellee was in plain sight of Engineer Tolle, and as the cars approached the standing car, appellee gave a slow signal to which Engineer Tolle responded by reducing the speed, and a stop signal as the cars came together. Just as the cars came together, Engineer Tolle saw appellee reach in a northerly direction with his right hand as though he was taking hold of the hand-hold on the southerly end of the L. E. & W. car, and at the same time throw his shoulders and head in an easterly direction. As the cars came together engineer Tolle saw someone approach appellee, causing engineer Tolle to think that appellee had been injured. As soon as he received a signal to back up, Engineer Tolle moved northward a few feet, and brakeman Carroll of the extra freight, who had arrived at the location where appellee was, took appellee to the westerly side of the cut of cars.

When brakeman Carroll reached appellee before the cut of cars had been backed up, he discovered that appellee's right foot was fastened between the jaws of the knuckles of the couplers on the T. & O. C. and L. E. & W. cars; that is, his foot and ankle were crushed between the ends of the couplers as they had locked in coming together making the coupling. In order to release appellee's foot it was necessary for Carroll to raise the lift lever on the T. & O. C. car which was located at the north east corner of that car, and then signal engineer Tolle to move back in a northerly direction. By raising the lift lever, the lock pin in the T. & O. C. coupler was released which permitted

signal and as they came together, a stop signal, but again the coupling did not make, and the T. & O. C. car moved south a short distance up against the head end of an extra freight train which was standing on the main track to the south of the T. & O. C. car. When the T. & O. C. car moved south, the coupling then waited toward the T. & O. C. car, signaling the engineer to proceed in a southerly direction, and in response to such signal, the engine and end of cars were moved south slowly. During this time Appellee was in plain sight of Appellee car Tolle, and as the cars approached the standing car, Appellee gave a slow signal to which Engineer Tolle responded by reducing the speed, and a stop signal as the cars came together. Just as the cars came together, Engineer Tolle saw Appellee reach in a southerly direction with his right hand as though he was taking hold of the hand-hold on the southerly end of the L. E. & W. car, and at the same time throw his shoulders and head in an easterly direction. As the cars came together engineer Tolle saw some one approach Appellee, causing engineer Tolle to think that Appellee had been injured. As soon as he received a signal to back up, Engineer Tolle moved northward a few feet, and broke man Carroll of the extra freight, who had arrived at the location where Appellee was, took Appellee to the westerly side of the end of cars.

When Engineer Carroll reached Appellee before the car was moved had been backed up, he discovered that Appellee's right foot was jammed between the jaws of the hook of the coupler on the T. & O. C. and L. E. & W. cars; that is, his foot and ankle were crushed between the ends of the coupler as they had locked in coming together making the coupling. In order to raise Appellee's foot it was necessary for Carroll to raise the left lever on the T. & O. C. car which was located at the north east corner of that car, and then swing the lever to the south to a position which would raise the foot.

the coupler jaws to open as the L. E. & W. car was moved north.

It will be remembered that the sole count remaining in the declaration and upon which the verdict and judgment were rendered, is based upon the alleged violation of the Federal Safety Appliance Act. Under the condition of the pleadings and the evidence, the liability, if any must be determined with reference to the provisions of the Federal Safety Appliance Act, and as to whether the alleged violation was the proximate cause of the accident and resulting injury. The Federal Safety Appliance Act provides, "It shall be unlawful * * * * * to haul, or permit to be hauled, or used, on its lines, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The claim of appellee is that the couplers in use on the two cars between which he was injured, and particularly on the T. & O. C. car did not have couplers which complied with the section of the statute above quoted, and that the failure to comply with that statute was the proximate cause of the injury.

Proximate cause has been defined to be, "An act which directly produced or concurred directly in producing the injury, and the immediate, direct, or efficient cause of injury; * * * * * that which, in a natural and continuous sequence, unbroken by any new cause, produces that event and without which that event would not have occurred." 32 Cyc. 745.

"An intervening, efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate, that is, the proximate cause of an injury."

Pullman Palace Car Company v. Laack, 143 Ill. 242.

"If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent and the existence of the condition is

not the proximate cause of the injury."

Seith vs. Commonwealth Electric Co. 241 Ill. 252-259.

"Before there can be a recovery on account of alleged defective condition of coupler, the evidence must show that such defective condition was proximate cause of injury."

St. L. & S. F. R. R. vs. Conarty, 238 U.S. 243.

"In order to enable an employee to recover when he has been injured by a car not properly equipped with automatic couplers, such improper equipment or the absence of an automatic coupler must be the proximate cause of his injury, and he has the burden to show that such was the fact."

Thornton's Federal Employers' Liability Act & Safety Appliance Acts 3rd Edition, Par. 307, p. 469.

Appellee testified that, the knuckle on the north end of the T. & O. C. car was open each time as the L. E. & W. car approached and came in contact with it; that the couplers were in proper alignment but that on the two occasions prior to the time of his injury, the coupling did not make or hold. He also testified that after the second attempt and after the cut of cars was moving slowly toward the standing T. & O. C. car, he gave a stop signal and that the cars were brought to a stop when the ends of the couplers were fourteen to seventeen inches apart; that after the cars stopped he went in between the ends of the two cars, closing the knuckle on the T. & O. C. car and found that the lock pin would not drop or lock; that when he found the pin would not drop, and he examined the couplers and taking the forefinger of his right hand, placed it in the hole at the bottom of the coupler and found that the pin was out of place and that the surface of the inside of the coupler where the pin was located, was rough; that he pulled the pin over and it dropped and locked.

He further testified that after so examining the T. & O. C. coupler and closing the knuckle, that he made no further attempt to open the knuckle on the T. & O. C. car by means of raising

not the proximate cause of the injury."

Beith vs. Commonwealth Electric Co., 111 Ill. 221-222.

"Before there can be a recovery on account of alleged de-

fective condition of coupler, the evidence must show that such

defective condition was proximate cause of injury."

St. L. & S. R. R. vs. Conarty, 288 S.W. 2d 845.

"In order to enable an employee to recover when he has been

injured by a car not properly equipped with automatic couplers,

such improper equipment or the absence of an automatic coupler

must be the proximate cause of his injury, and he has the burden

to show that such was the fact."

Thornton's Federal Employers' Liability Act & Safety
Appliance Acts 3rd Edition, Rev. 307, p. 453.

Witness testified that, the instant the car was at the

T. & O. car was open back time as the T. & O. car stopped.

ed and came in contact with it; then the couplers were in proper

alignment but that on the two occasions prior to the time of his

injury, the coupling did not make or hold. He also testified

that after the second attempt and after the car at said time

slowly toward the standing T. & O. car, he gave a stop signal

and that the cars were brought to a stop when the ends of the

couplers were fourteen to seventeen inches apart; that after the

cars stopped he went in between the ends of the two cars, close-

ing the knuckle on the T. & O. car and found that the lock pin

would not drop or lock; that when he found the pin would not drop,

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right hand, placed it in the hole at the bottom of the coupler

and found that the pin was out of place and that the surface of

the knuckle of the coupler where the pin was located, was rough;

that he pulled the pin over and it dropped and locked.

He further testified that after so examining the T. & O. C.

coupler and closing the knuckle, that he made no further attempt

the lift lever or otherwise, but that he decided then to open the knuckle on the south end of the L. E. & W. car. The lift lever on the L. E. & W. car was on the southwesterly corner and in order to reach that position, it was necessary that he got from his position on the east side of the two couplers to the west side. During all the time that he was working with the couplers, the testimony of appellee is that he was out of sight and view of the engineer operating the engine attached to the cut of cars. His testimony is that having decided to open the knuckle on the L. E. & W. car, which opened toward the west he took hold of the grab iron of the T. & O. C. car with his left hand near the easterly side of the car and with his right hand took hold of the brake staff at the south end of the L. E. & W. car, put his right foot on the drawbar on the flange side of the head of the drawbar on the T. & O. C. car and attempted to raise himself over the couplers; that as he did so, the cars to his right attached to the engine moved south, bringing the drawbar of the L. E. & W. car against the drawbar of the T. & O. C. car and crushing his right foot and ankle.

He further claims that he did not, from the time the cars were stopped with the drawbars approximately fourteen to seventeen inches apart until they came together crushing^h his foot, give any signal of any kind or character to the engineer to move the cut of cars and that the cars were moved without any direction or signal from him. He further states that as he grasped the hand hold on the T. & O. C. car and the brake staff on the L. E. & W. car, he threw his shoulders back toward the east and as he did so, after having placed his foot on the T. & O. C. coupler, he felt the movement of the L. E. & W. car toward the other car but that he made no effort to take his foot from the coupler and that his foot was caught between the ends of the drawbars.

On the trial of this cause appellee offered the testimony of engineer Tolle, who was operating the engine at the time of the injury to appellee, which was contained in a deposition taken on

the lift lever or otherwise, but that he decided then to open
the handle on the south end of the I. E. & W. car. The lift
lever on the I. E. & W. car was on the southwesterly corner and
in order to reach that position, it was necessary that he get from
his position on the east side of the two couplers to the west side.
During all the time that he was working with the couplers, the
testimony of appellee is that he was out of sight and view of the
engineer operating the engine attached to the out of cars. His
testimony is that having decided to open the handle on the I. E.
& W. car, which opened toward the west he took hold of the grab
iron of the T. & O. car with his left hand near the easterly
side of the car and with his right hand took hold of the brake
staff at the south end of the I. E. & W. car, and with his foot
on the treadle of the I. E. & W. car, he attempted to raise himself over the couplers;
that as he did so, the cars to his right attached to the engine
moved south, bringing the drawbar of the I. E. & W. car against the
drawbar of the T. & O. car and crushing his right foot and ankle.
He further states that he did not, from the time the cars were
stopped with the drawbars approximately fourteen to seventeen inches
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any kind or character to the engineer to move the out of cars and
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He further states that as he grasped the hand hold on the T. & O. car
and the brake staff on the I. E. & W. car, he threw his shoulders
back toward the east end as he did not, after having placed his foot
on the T. & O. car, he felt the movement of the I. E. & W.
car toward the other car but that he made no effort to take his
foot from the coupler and that his foot was caught between the ends
of the drawbars.

behalf of appellee, and the testimony of Tolle is to the effect that after the second attempt to couple the cars, appellee then gave the signal to back up which was obeyed by Tolle, and that no stop signal of any kind or character was given by appellee; that no stop was made until the cars came in contact and that appellee during all the time the cars were being moved, was in plain view of Tolle, and that appellee did not go in between the cars at any time after the second attempt to couple the same.

Engineer Tolle was also a witness on behalf of appellant upon the trial of said cause, and his testimony was to the same effect as his deposition, namely, that there was no movement of the cut of cars at any time without the direction and signal of appellee, and that appellee was at all times while the cars were in motion in his view.

Appellee alone, was in a position to know whether the knuckle on the couplers was open or closed at the time of the attempt to couple. While he testified that one of the knuckles was open and the other closed on the first two attempts, the fact that the couplers operated properly and without difficulty immediately following the injury indicates that the failure to couple in the first place was on account of the knuckles not being in proper alignment and the failure on the part of appellee to so align them before attempting to make the coupling or that one of the knuckles was not open.

At the time appellee claims to have examined the coupler on the T. & O. C. car, and to have discovered that the lock pin would not drop by reason of the roughness of the surface of the coupler if the testimony of Tolle is true, he was standing at the northeast corner of the T. & O. C. car in sight of engineer Tolle and not in a position where he could have examined the coupler.

The record also discloses that the deposition of engineer Beck was taken by appellee prior to the trial and read in evidence by him. Beck testified as to the two attempts to couple the cars

behalf of appellee, and the testimony of Tolle is to the effect that after the second attempt to couple the cars, appellee then gave the signal to back up which was obeyed by Tolle, and that no stop signal of any kind or character was given by appellee; that no stop was made until the cars came in contact and that appellee during all the time the cars were being moved, was in position of Tolle, and that appellee did not go in between the cars at any time after the second attempt to couple the same.

Engineer Tolle was also a witness on behalf of appellant upon the trial of said cause, and his testimony was to the same effect as his deposition, namely, that there was no movement of the cars at any time without the direction and signal of appellee, and that appellee was at all times while the cars were in motion in his view.

Appellee alone, was in a position to know whether the knuckles on the couplers was open or closed at the time of the attempt to couple. While he testified that one of the knuckles was open and the other closed on the first two attempts, the fact that the couplers operated properly and without difficulty immediately following the injury indicates that the failure to couple in the first place was on account of the knuckles not being in proper alignment and the failure on the part of appellee to see this before attempting to make the coupling or that one of the knuckles was not open.

At the time appellee claimed to have examined the coupler in the T. & O. C. car, and to have discovered that the lock pin would not drop by reason of the roughness of the surface of the coupler it is the testimony of Tolle in fact, he was standing at the rear corner of the T. & O. C. car in sight of engineer Tolle and not in a position where he could have examined the coupler.

The record also discloses that the deposition of engineer Tolle was taken by appellee prior to the trial and read in evidence.

prior to the time of the accident and that the third time the cars came together and stopped and Tolle said to him "I believe something has happened to Otto," appellee. Beck further testified that after each attempt to couple, the engine and out of cars stood still until a signal was received from appellee, and that there was no stopping of the engine or out of cars from the time they started after the second attempt until the cars came together on the third attempt; that following the injury he operated the engine when the cars were coupled together by brakeman Carroll, a member of the extra crew, that the cars attached to his engine were about ten feet from the T. & O. C. car when he received the signal to back up, some three or four minutes after the accident; that when the signal was given, Carroll stood at the north end of the T. & O. C. car where he could see him and that following the receipt of the signal to back up, he proceeded to obey such signal and move the cars south against the T. & O.C. car when the coupling was made; that the coupling held and only one attempt was made to couple the same.

Appellee also took the depositions of E. W. Smith and C. R. Eshelman prior to the trial of the case but did not offer or read them in evidence. Appellant offered them. Witness Smith testified he was Chief Inspector for the Lake Erie and Panhandle roads on the day of this occurrence and examined the cars within a few minutes after the accident occurred. His testimony is to the effect that he examined the couplers on both ends of the T. & O. C. car and found that they worked very good; that they were O. K.; that is, everything was alright. That there was nothing wrong or out of repair with reference to the knuckles, that they worked good; that he closed the knuckles and lifted the lift lever up and shut or closed it; that on each end of the cars there was nothing out of repair with reference to the automatic couplers; that he was familiar with the requirements of the Interstate Commerce Commission

prior to the time of the accident and that the third time

the cars came together and stopped and Tolle said to him "I believe something has happened to Otto," appellee. Back

further testified that after each attempt to couple, the

engine and out of cars stood still until a signal was re-

ceived from appellee, and that there was no stopping of the

engine or out of cars from the time they started after the

second attempt until the cars came together on the third

attempt; that following the injury he operated the engine when

the cars were coupled together by brakeman Garrell, a member

of the extra crew, that the cars attached to his engine were

about ten feet from the T. & O. car when he received the

signal to back up, and that he backed up after the

signal; that when the signal was given, Garrell stood at the

north end of the T. & O. car where he could see him and that

following the receipt of the signal to back up, he proceeded

to back up and move the cars north against the T. & O. car

when the coupling was made; that the coupling held and only

one attempt of was made to couple the same.

Appellee also took the depositions of E. W. Smith and

C. W. Bahaman prior to the trial of the case but did not offer

or read them in evidence. Appellant offered them. Witness

testified he was Chief Inspector for the Lake Erie and

examined the cars on the day of this occurrence and examined the

cars within a few minutes after the accident occurred. His

testimony as to the effect that he examined the couplers on

both ends of the T. & O. car and found that they worked very

well; that they were O. K.; that is, everything was alright.

That there was nothing wrong or out of repair in with reference

to the couplers, that they worked good; that he closed the

knuckles and lifted the lift lever up and shut or closed it;

with reference to the safety appliances, knuckles, lift levers and grab irons and that his examination disclosed that there was nothing out of repair on either car; that he made a report to the company of the condition of each car.

The witness Eshelman, the other inspector, whose deposition was read by appellant, testified that he examined both cars and found the coupling apparatus in perfect condition; that he signed the joint report of inspection with Inspector Smith. The testimony of the inspectors with reference to the condition of the cars in question, is corroborated by the testimony of brakeman Carroll who made the coupling immediately following the injury to appellee. After Carroll had assisted appellee in releasing his foot and taking him to a shady spot beside the right-of-way he was ordered by his conductor to clear the main track and then couple the two cars together so that the track could be cleared.

The following question was put to Carroll, "Tell us what you did from the time you got back to the car until you got the cars coupled and started up to the upper end of the yard. Tell us in detail just what you did in reference to making that coupling." He answered, "After I laid him in the shade and as I stated before, I went back to the cars where the accident happened, and backed up the engine against this car and made the coupling and pulled the cars down to the passing track and cleared the main and lined this switch up for the main track; I just backed them up. The knuckles were open on the T. & O. C. car up against the engine; I didn't do anything, only backed up and coupled on to the car. The coupling made when I went back. It made perfectly when we went back and held when we started ahead and continued to hold until we took the car up to the north end of the yards. There was nothing unusual in the way that coupling was made from any other coupling."

Brakeman Carroll also testified that the coupling made when appellee's foot was caught and that he pulled the pin in order to release appellee's foot. Carroll is corroborated in this

with reference to the safety appliances, Mr. Smith, first leaves
and first leaves and that his examination disclosed that there
was nothing out of repair on either car; that he made a report
to the company of the condition of each car.
The witness Reelmann, the other inspector, whose deposition
was read by appellant, testified that he examined both cars and
found the coupling apparatus in perfect condition; that he signed
the joint report of inspection with Inspector Smith. The testi-
mony of the inspectors with reference to the condition of the
cars in question, is corroborated by the testimony of appellant.
Appellant was made the coupling immediately following the injury
to appellant. After appellant had assisted appellant in releasing
his foot and taking him to a shady spot beside the right-of-way
he was ordered by his conductor to clear the main track and then
couple the two cars together so that the track could be cleared.
The following question was put to Corvelli, "Tell us what you
all from the time you got back to the car until you got the cars
coupled and started up to the upper end of the yard. Tell us in
detail just what you did in reference to making that coupling."
In answer, "After I laid the car down and the engine was
back, I went back to the car and made the coupling apparatus
beaked up the engine against the car and made the coupling and
wheels the car down to the passing track and cleared the main
and then this switch up for the main track; I just backed them
up. The knuckles were open on the T. & O. U. car up against the
main; I didn't do anything, only backed up and coupled on to
the car. The coupling made when I went back. It made perfectly
when we were back and then we started back and went
to back until we took the car up to the north end of the yard.
There was nothing unusual in the way that coupling was made from
any other coupling. And the first leaves up
Inspector Corvelli also testifies that the coupling made when

statement by car inspector Smith, that he found blood on the face of the knuckles.

Appellee was taken to a hospital shortly after receiving the injury and Dr. Hamilton a company physician was called and the doctor testified, that appellee, in reply to a question as to how the accident occurred, stated that he was pushing the coupling over with his foot and engine backed up.

It is shown by the evidence appellee was familiar with the rules and safety regulations issued by appellant, and that he had receipted for a copy of the same. The regulations prohibit any employee from kicking drawbars, while cars are in motion, and also prohibit any employee from going between the ends of the cars to adjust couplers, or for any other purpose, without bringing the cars to a stop and having them separated at least fifty feet.

The evidence shows appellee did not cause the cars to be separated at least fifty feet before attempting to make any adjustment of the couplers, and that he did not personally notify the engineer in charge of the engine, that he intended to go between the cars for any purpose.

In the suit of McCalmont v. Pennsylvania Railroad Company, 283 Federal, 736, decided October 4, 1922, affirming a judgment of the District Court of the United States, 273 Federal 231, it was claimed that the Federal Safety Appliance Act had been violated. McCalmont was foreman of car inspectors for the Pennsylvania Railroad Company at Conway where extensive yards were located. A car which had just been loaded at that point was found to have a coupler which required repairs, and the car was switched to an adjoining track. McCalmont, in the course of his inspection, observed the defective condition of the coupler and while repairing the same was injured by reason of another car being kicked against it. McCalmont failed to comply with the rule of the company, of which he had knowledge requiring the display of a flag or light at the end of the car before attempting to

statement by car inspector Smith, that he found Smith at the

face of the machine.

Appellee was taken to a hospital shortly after receiving

the injury and Dr. Hamilton, a company physician, was called and

the doctor testified, that appellee, in reply to a question as

to how the accident occurred, stated that he was pushing the

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The evidence shows appellee did not cause the cars to be

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In the suit of McCalmont v. Pennsylvania Railroad Company,

122 Federal, 758, decided October 4, 1902, affirming a judgment

of the District Court of the United States, 273 Federal 821, it

was claimed that the Federal Safety Appliance Act had been

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Pennsylvania Railroad Company at Conowingo where extensive yards

were located. A car which had just been loaded at that point

was found to have a coupler which required repairs, and the car

was taken to an adjoining track. McCalmont, in the course of

his inspection, observed the defective condition of the coupler

and while repairing the same was injured by reason of another car

work upon it.

The Circuit Court of Appeals held that the proximate cause of the injury to McCalmont, even though it be admitted that it was a violation of the Federal Safety Appliance Act, which furnished the condition permitting the accident, was the failure of McCalmont to observe and comply with the safety rule, provided for his protection. A petition for writ of certiorari was denied January 22, 1923, by the Supreme Court of the United States, 43 Supreme Court Reporter, 250.

In the case of Francis v. Kansas City etc., Railway Company, 110 Missouri, 387, 19 S.W. 935, it is said; "It would be most unreasonable and unjust, after imposing upon the master the duty of promulgating a rule for securing the safety of his servant, to permit the servant to recover from the master damages for injuries, which the observance of the rule would have prevented. As the master is bound at his peril, to make the rules, the servant should be equally bound, at his peril to obey them. In such case, the disaster is brought upon the servant by his own voluntary act, and he, and not the master, who has discharged his duty, should bear the consequences. So it has been uniformly ruled."

It is the contention of appellee that the couplers were defective because they did not couple automatically by impact, on the two attempts made immediately prior to the time that appellee was injured. It is insisted by appellant that the law does not require it to have had a coupler, which under any and all conditions and at all times, would couple automatically by impact. It is said by appellant, that any mechanical device is likely to fail under some conditions, and to require a carrier to furnish a device which will always, and under all circumstances work perfectly, is beyond the meaning and intent of the Federal Safety Appliance Act.

were upon it.

The Circuit Court of Appeals held that the negligence
cause of the injury to McCalmont, even though it is admitted
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rules, provided for his protection. A petition for writ of
certiorari was denied January 22, 1922, by the Supreme Court
of the United States, 42 Supreme Court Reporter, 280.

In the case of *Francis v. Kansas City etc., Railway
Company*, 110 Missouri, 337, 19 S.W. 328, it is said: "It
would be most unreasonable and unjust, after imposing upon the
master the duty of promulgating a rule for securing the safety
of his servant, to permit the servant to recover from the master
damages for injuries, which the observance of the rule would
have prevented. As the master is bound to his servant, to make the
rules, the servant should be equally bound, at his peril to obey
them. In such case, the disaster is brought upon the servant by
his own voluntary act, and he, and not the master, who has dis-
charged his duty, should bear the consequences. So it has been
uniformly ruled."

It is the contention of appellant that the company was
negligent because they did not couple automatically by impact,
on the two attempts made immediately prior to the time that
appellants was injured. It is insisted by appellant that the
law does not require it to have had a coupler, which under any
and all conditions and at all times, would couple automatically
by impact. It is said by appellant, that any automatic device
is likely to fail under some conditions, and to require a further
to furnish a device which will always, and under all circumstances
work perfectly, is beyond the meaning and intent of the Federal
Safety Appliance Act.

In St. Louis Southwestern Railroad Company vs. Bounds, 244 S. W. Reporter, 1099, a case in which Bounds, a brakeman employed by the railway company, and having the duty of giving signals, as well as coupling cars, had attempted to couple certain cars together. After the coupling had apparently been made he connected the air hose and gave the signal for the engine to pull ahead. When the engine moved, he discovered that the coupling had not made and after the forward car had been moved some six feet, the same was stopped and he went in between the cars for the purpose of doing something in connection with the coupling apparatus. While in that position, the cars noiselessly rolled down against the engine, crushing him between the two drawbars. Immediately following the accident it was discovered that the coupling between the cars and engine had made. Recovery was sought on the ground that there had been a violation of the Federal Safety Appliance Act. A judgment was had in the court below but the Court of Appeals reversed the same on the ground that there was no liability under the Federal Safety Appliance Act, it not appearing that there was any defect.

In deciding the case the court, at page 1102 said: "Neither the language nor the purpose of the Statute requires the equipment of cars with appliances that will operate with unfailing precision on every occasion. Such a degree of perfection is not essential to the safety of the employee for whose protection the equipment is required. It may be expected, from the very construction of such devices that in the course of time, and under the unavoidable, varying conditions incident to railway traffic, there may be occasions when more than one impact may be required in order to effect a coupling. * * * * * It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiencies of the devices had been disclosed by some reasonable test that would justify the conclusion that it was defective."

In St. Louis, Missouri, on the morning of the 10th of November, 1902, a case in which Boudin, a brakeman employed by the railway company, and having the duty of giving signals, as well as coupling cars, had attempted to couple certain cars together. After the coupling had apparently been made he connected the air hose and gave the signal for the engine to pull ahead. When the engine moved, he discovered that the coupling had not made and after the forward car had been moved some six feet, the same was stopped and he went in between the cars for the purpose of doing something in connection with the coupling apparatus. While in that position, the cars suddenly rolled down against the engine, striking him between the two shoulders. Immediately following the accident it was discovered that the coupling between the cars and engine had made. However, was sought on the ground that there had been a violation of the Federal Safety Appliance Act. A judgment was made in the court below but the Court of Appeals reversed the same on the ground that there was no liability under the Federal Safety Appliance Act, it not requiring that there was any defect.

In deciding the case the court, at page 1108 said: "Neither the language nor the purpose of the statute requires the appointment of cars with appliances that will operate with certainty in every condition. Such a device of perfection is not essential to the safety of the railways for these appliances are required to be required. It may be expected, from the very construction of such devices that in the course of time, and under the unavoidable, varying conditions incident to railway traffic, there may be occasions when more than one impact may be required in order to effect a coupling. * * * It would be manifestly unfair to hold that the statute had violated the statute with the intention of the device as it was also intended by some persons that such safety devices should be

In view of the facts as disclosed by this record, and the law arising therefrom, we are of the opinion appellee has not made out his case as alleged in the declaration. We are not prepared to say the weight of the evidence sustains the contention of appellee, that the alleged defective condition of the coupler, or either of them, was the proximate cause of the injury sustained by him. The record fails to disclose facts by which it can be fairly claimed appellee's act, in climbing between the cars, was set in motion by a defective condition of the couplers or either of them.

If we take the statement of appellee, that it was an improper movement of the cars, which caused the accident, it necessarily follows that it was occasioned by an intervening cause. The condition of the coupler as claimed by appellee cannot under the facts, be said to be a concurrent, proximate cause, with the improper movement of the cars. If the alleged negligence does nothing more than furnish a condition by which an injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the two are not concurrent acts of negligence, and the condition complained of is not the proximate cause of the injury.

Curran v. C' & W. I. R.R. Co. 289 Ill. 111-119.

If it be true as insisted by appellee that he closed the coupler on the south car, and remedied what defect there was in the coupler, and then attempted to cross the track between the cars, the accident cannot be said to be caused by the defect, but a new agency intervened; that is, his own act in attempting to cross the track between the cars, or to connect the couplers in position.

The rules of appellant company were known to appellee; the violation by an employee of a positive rule of which he has knowledge, bars a recovery, when the violation of the rule is the proximate cause of the injury.

In view of the facts as disclosed by this record, and the law arising therefrom, we are of the opinion appellee has not made out his case as alleged in the declaration. We are not prepared to say the weight of the evidence sustains the contention of appellee, that the alleged defective condition of the coupler, or either of them, was the proximate cause of the injury sustained by him. The record fails to disclose facts by which it can be fairly claimed appellee's act, in climbing between the cars, was set in motion by a defective condition of the couplers or either of them.

If we take the statement of appellee, that it was an improper movement of the cars, which caused the accident, it necessarily follows that it was occasioned by an intervening cause. The condition of the coupler as claimed by appellee cannot under the facts, be said to be a concurrent, proximate cause, with the improper movement of the cars. If the alleged negligence does nothing more than furnish a condition by which an injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the two are not concurrent acts of negligence, and the condition complained of is not the proximate cause of the injury.

Granger v. O. & W. I. R. R. Co. 289 Ill. 111-112.

It is to be true as insisted by appellee that he closed the coupler on the south car, and remained until defect there was in the coupler, and then attempted to cross the track between the cars, the accident cannot be said to be caused by the defect, but a new agency intervened; that is, the act of the plaintiff to cross the track between the cars, or to connect the couplers in position.

The rules of appellant company were known to appellee.

The violation by an employee of a positive rule of which he

has knowledge, is a technical violation of the rule.

We, therefore, conclude that the verdict of the jury was against the manifest weight of the evidence. The judgment must be reversed and the cause remanded.

Reversed and remanded.

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San Marino 10/10/1972. 10/10/1972. 10/10/1972.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

Mason W. Loomis, Eva K. Loomis,
E. E. Hook, and Alex Manthey,

Appellants,

vs

Appeal from
Circuit Court
Will County

Grant W. Miller, Jessie Pringle,
Mrs. D. E. Pringle, Thomas H. Condon
and William E. Loomis, Trustees of a
certain trust known as International
Milk Flour Company Ltd. S.T. Hart,
General Manager.

Appellees.

238 I.A. 636

Jett, P.J.

This is a bill filed by Mason W. Loomis, Eva K. Loomis, E. E. Hook and Alex Manthey, appellants, against Grant W. Miller, Jessie Pringle, Thomas H. Condon and William E. Loomis, Trustees of a certain trust known as International Milk Flour Company Ltd. S. T. Hart, General Manager, appellees, to quiet title to certain lands and premises and to cancel a contract to repurchase. In other words the question involved is whether or not a warranty deed and a contemporaneous agreement or option to repurchase given the grantor, constitute an absolute conveyance or mortgage. Appellees answered the bill and the International Milk Flour Company, Ltd. by leave of the court, filed a cross bill.

On hearing the court entered a decree dismissing the original bill and granting the relief as prayed for in the cross bill and the appellants prosecute this appeal.

Mason W. Loomis, one of the complainants in the original bill charges that he is seized in fee simple and is in possession of the following described real estate: The South Half of the North West Quarter of Section 36, except the South Forty rods of that part lying West of the Highway, containing in all seventy-seven acres situated in Township Thirty-seven, North, Range 10, East of the Third Principal Meridian in Du Page Township, Will County, Illinois.

James E. Loomis, John E. Loomis,
H. E. Loomis, and Alex. Mathew,

Appellants,

vs

Grant W. Miller, James Tringle,
Mrs. W. W. Tringle, Thomas E. Loomis
and William E. Loomis, Trustees of a
certain trust known as International
Milk Plant Company, Inc., d/b/a, Trust
Company.

Appellees.

Case No. 10.

This is a bill filed by Messrs. W. Loomis, John E. Loomis,
H. E. Loomis and Alex. Mathew, appellants, against Grant W. Miller,
James Tringle, Thomas E. Loomis and William E. Loomis, Trustees
of a certain trust known as International Milk Plant Company, Inc.,
H. E. Loomis, General Manager, appellees, to quiet title to certain
lands and premises and to cancel a contract to repurchase. In
their words the question involved is whether or not a warranty deed
and a contemporaneous agreement or option to repurchase given the
trustor, constitute an absolute conveyance or mortgage. Appellees
answered the bill and the International Milk Plant Company, Inc.,
by leave of the court, filed a cross bill.
On hearing the court entered a decree dismissing the
original bill and granting the relief as prayed for in the cross
bill and the appellants prosecute this appeal.
James W. Loomis, one of the complainants in the original
bill charges that he is seized in fee simple and is in possession
of the following described real estate: The South Half of the North
East Quarter of Section 36, except the North Forty rods of that part
labeled East of the Highway, containing in all seventy-seven acres
situated in Township 13 North, Range 10 East of the
Third Principal Meridian in De Pue Township, Will County, Illinois.

238 I.A. 636

Appeal from
Circuit Court
Will County

2.

It is alleged that the complainant E. E. Hook is the owner in fee simple and is in possession of the following described real estate, to-wit: That part of the North East fractional quarter of Section Thirty-Five described as Twenty acres next South of the north twenty acres of the North East fractional part of Section 35 except a certain right of way of C & Ry. and Chicago & Joliet Electric line, and in said bill described more minutely, and as being in Township 37 North Range 10, East of the Third Principal Meridian, containing 18.16 acres more or less; that the complainant Alex Manthey is the agent and tenant in possession for Mason W. Loomis of the real estate first described herein and that his tenancy of said real estate is from month to month under an agreement with said Loomis whereby complainant Manthey expects to purchase a part of the land, or had contracted to purchase, from said Loomis on the clearing of title thereto by this proceeding.

It is alleged in the bill that the said Mason W. Loomis acquired title to the real estate herein described from Grant W. Miller aggregating about 100 acres by a warranty deed, on January 30, 1922 subject to a mortgage in favor of the State Bank of Orion, of Orion, Henry County, Illinois, which said mortgage at time of said deed amounted to \$2800; that on May 4, 1922, the said Miller to correct an error in the description in the first deed executed a second deed to the said Mason W. Loomis. At the time of the making of the first deed a contract was entered into by the said Mason W. Loomis and the said Grant W. Miller, by which Miller was given the option to repurchase the said lands and premises. The contract recited that the said Miller had conveyed to the said Mason W. Loomis the said lands and premises and among other things provided: "Whereas it is the desire of the parties hereto that

3.

the party of the first part have the privilege of repurchasing the property herein before described, now therefore, for and in consideration for the sum of \$1.00 and other good and valuable consideration receipt of which is hereby acknowledged, it is hereby mutually agreed as follows: that the party of the first part have the privilege of repurchasing the equity in the above described property on or before April 30, 1922, for the sume of \$3552.51 subject to a mortgage of \$2800, expiring by extension on ourabout September 1, 1922. It is further mutually agreed by and between the parties hereto that time is the essence of this contract and that if the privilege of repurchasing hereinbefore provided for is not complied with strictly and promptly then this contract is to be "null and void". It is further mutually agreed by and between the parties hereto that in case of the repurchase by party of the first part from party of the second part, his heirs, executors, administrators or assigns that the said party of the second part, his heirs, executors, administrators or assigns shall only be called upon to reconvey to the said party of the first part his, heirs, executors, administrators, or assigns so much property as has been by said warranty deed heretofore mentioned conveyed by party of the first part to party of the second part hereto.

On January 31, 1922, the said Miller assigned all of his right, title and interest in said contract of repurchase to International Milk Flour Company Ltd.

On January 5, 1923, the said Grant W. Miller conveyed and quiet claimed all interests in said lands described in said bill, to the said International Milk Flour Company Ltd. The evidence shows that the said Miller held the title to the said lands and premises involved in this proceeding in trust for the said International Milk Flour Company, and that there is no controversy between Miller and the Flour Company to the

the party of the first part have the privilege of re-
purchasing the property herein before described, now therefore,
for and in consideration for the sum of \$1.00 and other good
and valuable consideration receipt of which is hereby ac-
knowledgeed, it is hereby mutually agreed as follows: that
the party of the first part have the privilege of repurchasing
the equity in the above described property on or before April
30, 1931, for the sum of \$8552.51 subject to a mortgage of
\$2500, existing by extension on or about September 1, 1928.
It is further mutually agreed by and between the parties
hereto that time is the essence of this contract and that if
the privilege of repurchasing hereinafore provided for is not
complied with strictly and promptly then this contract is to
be "null and void". It is further mutually agreed by and be-
tween the parties hereto that in case of the repurchase by
any of the first part from any of the second part, his
heirs, executors, administrators or assigns that the said
party of the second part, his heirs, executors, administrators
or assigns shall only be called upon to reconvey to the said
party of the first part his heirs, executors, administrators,
or assigns so much property as has been by said warranty deed
heretofore mentioned conveyed by party of the first part to
party of the second part hereto.
On January 31, 1928, the said Miller assigned all of
his right, title and interest in said contract of repurchase
to International Milk Flour Company Ltd.
On January 3, 1928, the said Grant W. Miller conveyed
and quiet claimed all interests in said lands described in
said bill to the said International Milk Flour Company Ltd.
The evidence shows that the said Miller held the title to the
said lands and premises involved in this proceeding in 1928

4.

ownership of said lands. In June 1922, Loomis was paid, from the funds of the cross complainant, \$100.00; which payment was made for the purpose of extending the time to repurchase the lands.

It is the contention of appellants the deeds of conveyance executed by Miller constituted an absolute conveyance of the 100 acres in question to Mason W. Loomis; that when a deed was executed to appellant Hook that the grantor Loomis had freed himself from any obligation to resell the land in question to Miller or his assigns; that Hook got a fee simple title to the 18.16 acres; that when Manthey entered into a contract to purchase approximately eight acres, that Loomis had legal title to the eight acres and that Manthey now has a valid and legal right to receive a deed of the eight acres from Loomis on the completion of his payments under said contract; that in as much as the deeds and the transaction constitute an absolute conveyance of the 100 acres to Loomis, he is not compelled by any law or any rule of equity to account to appellee, National Milk Flour Co. Ltd.

It is the contention of cross complainant that the deed given to Loomis by Miller together with the contract concurrently entered into, between Miller and Loomis, constitute a mortgage and that the equity in the land in question is in International Milk Flour Co. Ltd. It was stipulated on the trial that the trustees of the said Milk Flour Company, Ltd. at the time of the institution of the suit were Jessie Pringle. Mrs. ~~D. E.~~ Pringle, Thomas H. Condon, and William E. Loomis; that Sidney T. Hart, William H. Brown, Thomas H. Condon and Walter C. Brown were trustees of the common Law trust in the month of December 1921, and until some time in May 1922; that the declaration of the trust was recorded in La Porte County, Indiana in 1919. Loomis recognized Hart and Brown; he knew the International Milk Flour Company was a trust and that Hart

ownership of said lands. In June 1922, Loomis was paid from the funds of the cross complainant, \$100.00; which payment was made for the purpose of extending the time to re-

possess the lands. It is the contention of appellant the deeds of convey-

ance executed by Miller constituted an absolute conveyance of the 100 acres in question to Mason W. Loomis; that when a deed was executed to appellant Hook that the grantor Loomis had freed himself from any obligation to resell the land in question to Miller or his assigns; that Hook got a fee simple title to the 18.16 acres; that when Mantney entered into a contract to purchase approximately eight acres, that Loomis had legal title to the eight acres and that Mantney now has a valid and legal right to receive a deed of the eight acres from Loomis on the completion of his payments under said contract; that in as much as the deeds and the transaction constitute an absolute conveyance of the 100 acres to Loomis, he is not compelled by any law or any rule of equity to account to appellee, National Milk Flour Co. Ltd.

It is the contention of cross complainant that the deed given to Loomis by Miller together with the contract document-ly entered into, between Miller and Loomis, constitute a mortgage and that the equity in the land in question is in International Milk Flour Co. Ltd. It was stipulated on the trial that the trustees of the said Milk Flour Company, Ltd. at the time of the institution of the suit were Jesse Pringle, Mrs. F. E. Pringle, Thomas H. Gordon, and William E. Loomis; that Sidney T. Earl, William E. Brown, Thomas H. Gordon and Walter C. Brown were trustees of the common law trust in the month of December 1921, and until some time in May 1922; that the declaration of the trust was recorded in its proper county,

and Brown were two of the trustees.

It is shown by the evidence that the cross complainant in December 1921, was indebted to Edward Hines Lumber Company; at that time the complainant, Mason W. Loomis, was employed by said lumber company and it was, in part, his business to collect the claim due the lumber company from the cross complainant. As Miller held title to the lands in question for the use of the Milk Flour Company an arrangement was entered into by which Miller with the approval and sanction of the Milk Company was to borrow \$3000 from Loomis and that Miller was to give a deed to the land to secure the payment thereof. Loomis advanced \$3000 and Miller executed and delivered the deed and thereupon the indebtedness due the Hines Lumber Company was paid. It appears that at the time the \$3000 was loaned by Loomis that it was agreed that the said \$3000 should be repaid to Loomis on or before April 30, 1922 together with a premium amounting to \$552.50; that upon payment of said sum of \$3552.50 the said Loomis would reconvey the said lands to Miller or his assigns. Loomis was to receive a bonus for his loan and it is shown by the contract entered into between Miller and Loomis in which the privileges of repurchasing the equity in the property was given. A clause of that contract reads as follows: "That the party of the first part have the privilege of repurchasing the equity in the above described property on or before April 30, 1922 for the sum of \$3552.50 subject to a mortgage of \$2800 expiring by extension on or about September 1, 1922."

It appears by the terms upon which the premises were to be repurchased or reconveyed that Loomis charged interest on the money involved on the bonus of \$500. This is quite evident from the following: The principal of the loan was \$3000, bonus \$500 and interest at ~~11%~~ 6% on \$3500 for 3 months \$52.50,

and Brown were two of the parties.

It is shown by the evidence that the cross complainant in December 1921, was indebted to Edward Hines Lumber Company; at that time the complainant, Mason W. Loomis, was employed by said Lumber company and it was, in part, his business to collect the claim due the Lumber company from the cross defendant. As Miller said in the facts in question the fact of the Lumber company's indebtedness was admitted into by said Miller with the approval and sanction of the Lumber company was to borrow \$2000 from Loomis and that Miller was to give a deed to the land to secure the payment thereof. Loomis advanced \$2000 and Miller executed and delivered the deed and thereupon the indebtedness was the same as before. Company was paid. It appears that at the time the deed was issued by Loomis that it was agreed that the said \$2000 should be repaid to Loomis on or before April 1, 1922. Miller with a premium amounting to \$25.00; that upon payment of said sum of \$2552.50 the said Loomis would convey the said lands to Miller or his assigns. Loomis was to receive a bonus for his loan and it is shown by the contract entered into between Miller and Loomis in which the privileges of repurchasing the equity in the property was given. A clause of that contract reads as follows: "That the party of the first part have the privilege of repurchasing the equity in the above described property on or before April 1, 1922 for the sum of \$2552.50 subject to a mortgage of \$1500 existing by extension on or about September 1, 1922." It appears by the terms upon which the premises were to be repurchased or redeemed, that Loomis always retained an interest in the money involved in the bonus of \$500. This is quite evident from the following. The principal of the loan was

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the amount upon receipt of which Loomis was to reconvey. Loomis never at any time attempted to take actual possession of the premises until After July 5, 1922.

One element that enters into this case that is a circumstance proper to be taken into consideration in determining the issues is the value of the property itself. The deed to Miller recited a consideration of \$12,000 and is subject to an encumbrance which from exhibits offered by appellants seems to be \$2800. Loomis sold 18.16 acres of the land for \$2240.00, and has contracted to sell between seven and eight acres for \$2750.00 leaving him about 75 acres subject to a mortgage of \$1500 which sum remains due the bank that holds the mortgage, payments having been made on the mortgage when payments were made to Loomis for land sold. Loomis received and contracted to receive \$4990.00 besides rents and what was paid for extensions. Loomis says the land is worth \$10,000; that he placed the value around \$100 per acre in August 1922.

It is contended by appellants that by the contemporaneous contract appellee had a right to redeem until April 30, 1922. Notwithstanding that contention complainant Loomis notified the International Milk Flour Company through one Campbell Marvin, concerning the failure to pay for the extension through the month of May 1922 and the failure to pay the 1922 taxes as agreed by Miller and Hart, two of the trustees of the Milk Flour Company. It will be remembered that on June 4, 1922, Loomis received from Campbell Marvin, representing the Milk Company, a check for \$100 for the May extension and for an extension during the month of June. Loomis evidently, by his act, recognized the fact that there was an agreement for the extension of time in which to redeem and he accepted a consideration of \$100 that was paid for the express purpose of extending the time.

the amount upon receipt of which Loomis was to receive. Loomis never at any time attempted to take actual possession of the property until after July 5, 1932.

One element that enters into this case that is a circumstance proper to be taken into consideration in determining the value of the property itself. The deed to Loomis recited a consideration of \$12,000 and is subject to an encumbrance which from exhibits offered by appellants seems to be \$2500. Loomis sold 18.16 acres of the land for \$2240.00 and was contracted to sell between seven and eight acres for \$175.00 leaving him about 75 acres subject to a mortgage of \$1200 which was retained by the bank that holds the mortgage. Payments having been made on the mortgage when payments were made to Loomis for land sold. Loomis received and contracted to receive \$12,000 for the land and was paid for extensions. Loomis says the land is worth \$10,000; that he placed the value around \$100 per acre in August 1932.

It is contended by appellants that by the contemporaneous contract appellee had a right to redeem until April 30, 1932. Notwithstanding that contention complainant Loomis notified the International Milk Farm Company through one Campbell that, concerning the failure to pay for the extension through the month of May 1932 and failing to pay for the same as agreed by Miller and Hart, one of the witnesses at the trial. It will be remembered that on June 4, 1932, Loomis received from Campbell Marvin, representing the Milk Farm Company, a check for \$100 for the May extension and for an extension during the month of June. Loomis evidently, by his act, recognized the fact that there was an agreement for the extension of time in which to pay and he accepted a contribution of \$100 that was paid for the express purpose of

The question now to be determined is, was the deed in question an absolute sale and conveyance, or was it in connection with the agreement for a repurchase by the grantor a mortgage? The answer to this question, of course, depends upon what was intended by the parties to it at the time of its execution. In arriving at the intention of the parties the instrument itself must be first looked to, for, as a general rule, where there is nothing equivocal or ambiguous in the terms of a written instrument it should be given effect according to the plain and obvious import of the language used, unless to do so would lead to unreasonable or absurd consequences. A well established exception to this general rule is found in the law of mortgages, which permits the showing of a deed plain and unambiguous in its terms, and absolute on its face, to be a mortgage or merely security for the loan of money, or for the performance of some other act or duty. *Bearss vs Ford*, 108 Ill. 16-22-23.

The rule of law is well settled in this state in cases of this character. The question presented and determinative of the case is one of fact only. The weight accorded to the finding of fact by the trial judge who has seen and heard the witnesses is also to be considered in passing upon the question here presented. *Story vs Springer*, 155 Ill. 205.

The question of the intention of the party must be ascertained from all of the surrounding circumstances. *Preschbaker vs Heirs of Peamen*, 32 Ill. 475.

It is earnestly insisted in this case that because of the fact it is recited time is the essence of the contract, that for that reason the contention of complainant in the original bill should be sustained. This fact does not bar the right to redeem.

The question now to be determined is, was the land in question an absolute sale and assignment, or was it a mortgage? The answer to this question, of course, depends upon what was intended by the parties to it at the time of its execution. In arriving at the intention of the parties the instrument itself must be first looked to, for, as a general rule, where there is nothing equivocal or ambiguous in the terms of a written instrument it should be given effect according to the plain and obvious import of the language used, unless to do so would lead to unreasonable or absurd consequences. A well established exception to this general rule is found in the law of mortgages, which permits the showing of a deed plain and unambiguous in its terms, and absolute on its face, to be a mortgage or merely security for the loan of money, or for the performance of some other act or duty. *See* *James v. Hays*, 103 Ill. 16-22-23.

The rule of law is well settled in this state in cases of this character. The question presented and determinative of the case is one of fact only. The weight accorded to the finding of fact by the trial judge who has seen and heard the witnesses is also to be considered in passing upon the question here presented. *Story vs. Springer*, 155 Ill. 205.

The question of the intention of the party must be ascertained from all of the surrounding circumstances.

Frederick vs. Heitz of Bremen, 38 Ill. 475.

It is earnestly insisted in this case that because of the fact it is well settled in the law of this state, that for that reason the contract of sale must be the ruling principle should be maintained. This fact does not bar the right to recover.

8.

Tenney vs Nicholson, 87 Ill. 464.

It will be remembered that forfeitures are not regarded with favor by courts of equity and under the peculiar facts in this case the complainants in the original bill have not made such a showing to authorize a decree by reason of the fact that time is the essence of the contract.

The maxim of equity, once a mortgage always a mortgage, and the true character of every conveyance of land is open to inquiry and investigation no matter what form the parties may have given the transaction. Wynkoop vs Cowing, 21 Ill. 570-580 and cases cited.

From a mere statement of the facts in this cause the conclusion is irresistible, that when Loomis lent the \$3000, the deed to the land was taken as security for the debt. His subsequent conduct so indicates. The cross complainant agrees to carry out the terms of the contracts of sale made or promised to be made by Loomis as is disclosed in the record. Under the peculiar facts in this cause the equities are with the cross complainant.

The conclusion of the trial Judge on conflicting evidence should not be ~~dis~~regarded unless manifestly erroneous.

In conclusion we are of the opinion that the Chancellor committed no error in rendering the decree in favor of the cross complainant. The decree of the Circuit Court of Will County is affirmed.

DECREE AFFIRMED.

Torrey vs. Mitchell, 23 Ill. 441.

It will be remembered that Torrey's case was not reported.

with favor by courts of equity and under the peculiar facts

in this case the complainants in the original bill have not

made such a showing to authorize a decree by reason of the

fact that time is the essence of the contract.

The maxim of equity, since a mortgage always a mortgage,

and the true character of every conveyance of land is open to

inquiry and investigation no matter what form the parties

may have given the transaction. *Wynkoop vs. Cowing*, 23 Ill.

473-580 and cases cited.

From a bare statement of the facts it does not follow that

the case is irretrievable, that Torrey's land was sold.

the deed to the land was taken as security for the debt. The

subsequent conduct of the parties.

The cross complaint is not a contract of sale made or

promised to be made by Torrey as is claimed in the report.

Under the peculiar facts in this case the equity is clear

the cross complaint.

The conclusion of the trial judge is not a binding precedent

should not be followed unless manifestly erroneous.

In conclusion we are of the opinion that the complainant

committed no error in rendering the decree in favor of the

cross complainant. The decree of the Circuit Court is affirmed.

Very respectfully,
J. B. ALLEN, JUDGE.

REPORTED BY J. B. ALLEN, JUDGE.

REPORTED BY J. B. ALLEN, JUDGE.

REPORTED BY J. B. ALLEN, JUDGE.

STATE OF ILLINOIS, }
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

7397
4504
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 637¹

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

IN APPELLATE

JONES

A.

HON THOMAS M. JEN

JUSTUS L. JOHNSON

J. WELTER, Sps

in the words and figures

7397

Agenda 25.

REBECCA MCCORMICK AND

ARABELLA MCCORMICK,

APPELLEES

vs

CITY OF PERU,

APPELLANT.

APPEAL FROM THE

CIRCUIT COURT OF

LA SALLE COUNTY.

238 I.A. 637

Jett, P.J.:

Rebecca McCormick and Arabella McCormick, appellees, brought this suit in the Circuit Court of LaSalle County, against the City of Peru, appellant, for the recovery of damages alleged to have been sustained by them, through the action of the officers of said city in turning off electric current supplied to them by the city. The suit was one in case, and the trial progressed to the close of the testimony of appellees at which time the court indicated that it would sustain a motion to direct a verdict because a contract was sought to be established and a recovery had under it. Such proceedings were had that appellees were permitted to amend praecipe, summons and declaration with a view of changing the action from one in case to assumpsit. The only change made in the amendment however was in crossing out the word case and inserting the word assumpsit in the praecipe, summons and in the introduction of the declaration, and adding the words, "on promises" after the word case.

A plea to the amended declaration was filed with notice of special defenses to be given thereunder. A jury trial was had and a verdict rendered in favor of appellee for Seven Hundred and Niney-one Dollars. After a denial of motions for new trial, and in arrest of judgment, judgment was rendered on the verdict and the appellant prosecutes this

REBECCA MCGORMICK AND
ARABELLA MCGORMICK,
Appellants

APPEAL FROM THE
CIRCUIT COURT OF
LA SALLE COUNTY.

vs
CITY OF PEERU,

Appellant.

238 I.A. 637

1937, P. 11.

Rebecca McGormick and Arabella McGormick, appellees,

brought this suit in the Circuit Court of LaSalle County,

against the City of Peru, appellant, for the recovery of

damages alleged to have been sustained by them, through the

action of the officers of said city in turning off electric

current supplied to them by the city. The Court was one in case,

and the trial progressed to the close of the testimony of

appellees at which time the court indicated that it would

sustain a motion to direct a verdict because a contract was

sought to be established and a recovery had under it. Such

proceedings were had that appellees were permitted to amend

pleadings, summons and declaration with a view of changing

the action from one in case to assumpsit. The only

change made in the amended declaration was in changing the

the word "and" inserting the word "summons" in the

pleadings, summons and in the introduction of the declaration,

and adding the words, "for recovery" after the word "and".

A plea to the amended declaration was filed with copies

of special defenses to be given thereunder. A jury trial

was had and a verdict rendered in favor of appellees for

seven hundred and ninety-one dollars. After a denial of

2.

appeal.

It appears from the evidence that appellees are the owners of farm lands adjoining the City of Peru, and claim they entered into a contract with the superintendent of the water works and light plant of said city, for the furnishing of electric current to them for use on the farm in operating straw bailers, grain elevators, corn shellers, pumps and other machinery. The alleged contract, if one was entered into, was an oral one, with no limitation as to its duration. The city erected an extension of its line to the farm and installed a meter for which appellees paid. This arrangement continued for something like four years, when the meter got out of order and charges were then made ^{and paid} for upon a flat rate basis. Later on appellees claimed they were being over charged, and refused to pay the bills rendered them and the city cut off the service.

Appellant assigns a number of reasons for a reversal of the judgment and among them are-that there is no merit in appellees claim under the pleadings; that no contract was proven; that the court admitted incompetent evidence on behalf of appellees; that appellees' are bound by the remedy they selected because previous to the institution of the suit they filed a bill in chancery to compel the city to furnish them with electric current and for an accounting, and that the suit as made in the bill was settled and dismissed, and having elected this remedy in equity, they can not prosecute this case; that the court erred in not directing a verdict at the close of plaintiff's testimony and at the close of all the evidence; that the court failed to apply the correct rule for the measure of damages; that it was error in denying the motions for a new trial and in arrest of judgment.

Appellees rest their case on the following. 1. The city while acting in its proprietary right, for a good consideration, contracted to furnish ~~x~~ power at a certain price under an

It appears from the evidence that appellants are the owners of the lands adjoining the city of Los Angeles, and that they entered into a contract with the superintendent of the water works and light plant of said city, for the furnishing of electric current to them for use on the farm in operating straw blower, grain elevators, corn shellers, pumps and other machinery. The alleged contract, if one was entered into, was a valid one, with no limitation as to its duration. The city requested an extension of its time to the farm and installed a meter for which appellants paid. This arrangement continued for something like four years, when the meter was out of order and repairs were made upon a flat rate basis. Later on appellants claimed they were being over charged, and refused to pay the bills rendered them and the city cut off the service. Appellants maintain a bill of exchange for a payment of \$1000.00 and claim that there is no merit in appellants' claim when the plaintiff testifies that no contract was proven; that the court admitted incompetent evidence on behalf of appellants; and appellants are bound by the remedy they selected because previous to the institution of the suit they filed a bill in equity to compel the city to furnish them with electric current for an accounting, and that the suit as made in the bill was settled and dismissed, and having elected this remedy in equity, they can not prosecute this case; that the court erred in not granting a verdict at the close of plaintiff's testimony as at the close of all the evidence; that the court failed to give the correct rule for the measure of damages; that it was error in finding the suit was a contract suit and in awarding judgment.

Appellants rest their case on the following: 1. The city's action is its proper remedy. 2. The city's action is its proper remedy. 3. The city's action is its proper remedy.

3.

ordinance giving the superintendent power to make such contract, and it should be binding, especially, when appellees were forced to outlay a considerable sum of money in order that the contract might be carried out while it remained in full force and effect.

2.

That the charges for power made against appellee, were maliciously excessive, false, unjust, exorbitant and not based upon any agreement which would warrant their enforcement.

3. That the ordinances passed by the City of Peru in August 1915, and in December 1915, fixing prices of electric lights or power, furnished by the city, in law did not in any manner, repeal, annul or modify, any agreement theretofore, for a valuable consideration made with appellees by the superintendent of the light and water committee, while said superintendent, in making the agreement with appellees acted with authority under an ordinance of the city, nor did the city in any manner repudiate the same.

4. That the city arbitrarily, wrongfully and unlawfully, and without any just cause, while knowing the great damage which would be suffered, cut off the electric power theretofore furnished to appellees by agreement.

5. That a large amount of damage was suffered because of the wrongful conduct on the part of the city in turning off the electric power.

6. That appellees were not bound to pay to appellant excessive and unjust demands.

It is certainly difficult, from the pleadings, to determine just what issues are raised, and it is likewise true that we have had much difficulty in ascertaining from the record what the real facts are in the case. That this suit was originally an action on the case, was confessed by appellees, when at the close of the testimony on the first hearing, they asked leave to amend the declaration so as to make it a proceeding in assumpsit. It is not the name that is given to a declaration

...giving the superintendent power to raise and con-
...and it should be binding, especially, when appeals were
...to make a considerable sum of money in order that the
...might be carried out and it was in 1901 that the

...
...That the charges for power and lighting appeals, were
...excessive, false, unjust, arbitrary and not based
...on any agreement which would justify their enforcement.
...That the ordinance passed by the City of New York in
...1913, and in December 1911, fixing prices of electric
...power, furnished by the city, in fact did not in any
...manner, repeal, annul or modify, any agreement heretofore, for
...valuable consideration made with appellants by the respondents,
...the light and water companies, while said respondents,
...during the agreement with appellants acted with authority under
...ordinance of the city, nor did the city in any manner repudiate

...
...That the city arbitrarily, wrongfully and unlawfully,
...without any just cause, while knowing the facts aforesaid
...and the electric power companies
...refused to appeal by agreement.

...That a large amount of damage was suffered by appellees
...the respondents of the fact of the city in turning off
...electric power.

...That appellants were not bound to pay to respondents
...and unjust damages.

...It is certainly admitted, that the respondents, in refusing
...to make a reasonable trial, and in refusing that the
...had much difficulty in ascertaining from the record what the
...fact was in the case. That this was originally an
...on the case, was suggested by respondents, and as the
...of the testimony on the first hearing, that when James

4.

that determines the character of action; ~~that~~ action must be determined from the averments of the declaration. If this was an action, in the first instance, in case, we are unable to perceive that by reason of the only amendments made, it can be said that it is now a suit in assumpsit.

After leave to amend was granted, the praecipe and summons are in assumpsit, while the averments of the counts of the declaration are in case. No amendment or change in the allegations of the counts were made; the only change was in the crossing out of the words "case" and in place thereof the word "assumpsit" was written in the summons, praecipe, and introduction of the declaration, and adding the words "on promises", after the words "case" in the introduction of the narr.

In view of the conclusion we have reached in this case, it is not so important what the name of the action is called. The appellant is a municipal corporation; it can speak only by ordinances and resolutions adopted by its city council, and approved by its mayor. If the ordinance in force at the time of the making of the alleged contract did not give to the superintendent of the light and water plant of said city, the authority ~~was~~ to enter into the contract that appellees claim was entered into, and if there was no law authorizing it, it does not matter whether there was a breach of the contract or not, no recovery could be had. The ordinance relied upon was adopted by the City Council of the City of Peru on April 30, 1913, and provides:-

Section 1. Creates the office of Superintendent of Water and Light.

Section 2. Superintendent of Water and Light shall be appointed by the Mayor with the advice and consent of council, to hold office during the pleasure of the Mayor and City Council not exceeding one year.

Section 3. Superintendent of Water and Light shall exercise a general supervision over the Water and Light system of the

...the character of action; that action must be determined from the events of the declaration. If this was the case, in the first instance, in case, we are unable to see that by reason of the only amendments made, it can be

and that it is now a suit in assumpsit.

After leave to amend was granted, the proscipe and summons were amended, while the events of the counts of the declaration are in case. No amendment or change in the allegations of the counts were made; the only change was in the cross-action, and in place thereof the word "case" and in place thereof the word

"assumpsit" was written in the summons, proscipe, and introduction of the declaration, and adding the words "on promise", after the introduction of the writ.

In view of the conclusion we have reached in this case, it is not so important what the name of the action is called. It is a municipal corporation; it can sue only by

ordinance and resolution passed by its city council, and approved by its mayor. If the ordinance in force at the time of the making of the alleged contract did not give to the defendant of the light and water plant of said city, the authority to enter into the contract that appellee claim as entered into, and if there was no law authorizing it, it is not matter whether there was a breach of the contract or not.

The ordinance relied upon was passed by the City Council of the City of Peru on April 30,

Section 1. The city of Peru shall be

Section 2. The Superintendent of Water and Light shall be appointed by the Mayor with the advice and consent of council, and shall hold office during the pleasure of the Mayor and City

5.

City of Peru, including the power plant and all extensions of water and light system, and also all renewals and repairs.

Section 4. Superintendent of Water and Light shall at all times be subject to directions and instructions of the Mayor and City Council.

Section 5. Fixes the Salary of Superintendent of Water and Light.

Section 6. Repeals all Ordinances and parts of Ordinances in Conflict therewith.

Section 7. Ordinances to be in force from and after its passage and approval.

This is the ordinance appellees insist, gave the Superintendent authority to make the contract on which they base their right to prosecute this suit.

The most that can be said of this ordinance is that section three gives to the superintendent the general supervision over water and light system of the City of Peru. Supervision means the act of overseeing; inspection; superintendence. Nowhere does it appear in the ordinance that the superintendent is given authority to enter into a contract.

It will be observed that the ordinance relied upon by appellees became effective April 30, 1913. At that time the statute did not authorize municipalities to own and operate electric light plants for the purpose of furnishing light and power. Cities and villages did not have this authority until after the enactment of the Municipal Ownership Act. Prior to the adoption of the Municipal Ownership Act it was held cities and villages had no power under the statute to furnish electric lights to the inhabitants nor to fix the rates and collect for the services. Village of Ladd vs Jones 61 Ill. App. 584. This case seems to have met with the approval of the Supreme Court in the case of the Village of Palestine vs Siler, Administrator, 225, Ill. 630-637.

ity of power, including the power plant and all extensions of
the system, and also all renewals and repairs.
Section 4. Superintendent of Water and Light shall of all
lines be subject to directions and instructions of the Mayor and
the Board of Aldermen.

Section 5. Repairs all Ordinances and parts of Ordinances
shall be subject to the same.

Section 6. Ordinances to be in force from and after its
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The most that can be said of this ordinance is that section

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not of overseeing, inspection, superintendence. Nowhere
does it appear in the ordinance that the superintendent is given

authority to enter into a contract.
It will be observed that the ordinance relied upon by

appellees became effective April 30, 1938. At that time the
statute did not authorize municipalities to own and operate

electric light plants for the purpose of furnishing light and
power. Cities and villages did not have this authority until

after the enactment of the Municipal Ownership Act. Prior to
the adoption of the Municipal Ownership Act it was held cities

and villages had no power under the statute to furnish electric
light to the inhabitants not to fix the rates and collect for

services. Village of Lada vs Jones 61 Ill. App. 584.
The case seems to have met with the approval of the Supreme
Court in the case of the Village of Palestine vs Miller,

If it be true that cities and villages prior to the Municipal Ownership Act had no power under the statute to furnish electric lights nor to fix the rates and collect for such service, it would certainly follow that they would have no authority to furnish power either within or without the limits of the municipality.

The powers of a municipal corporation are only those which are expressly granted or necessarily implied to make the grant of specific powers effective, and if there is no express authority for a contract or any legitimate corporate purposes from which the power to enter into the contract may be implied, the contract is void and cannot be enforced. *The Eastern Illinois State Normal School vs The City of Charleston*, 271 Ill. 602.

Municipal corporations derive their existence and their powers solely from the General Assembly, and in order to legislate upon or with reference to a particular subject or occupation they must be able to point out the statute which gives them authority to do so. *Arms, et al. vs The City of Chicago*, 314 Ill. 316.

Statutes granting powers to municipal corporations are strictly construed, any fair or reasonable doubt being resolved against the exercise of the power, and implied powers are those necessarily incident to the powers expressly granted. *Arms, et al. vs City of Chicago*, *Supra*; *The Aberdeen-Franklin Coal Co. et al. vs The City of Chicago*, 315 Ill. 99

A city cannot be estopped to repudiate a contract which it had no express or implied power to make, as everyone is presumed to know the extent of the powers of a municipal corporation, and the sustaining of a claim of estoppel would be conferring power upon the city to do unauthorized acts simply because it has done them and received the benefit. *Eastern Illinois State Normal School vs The City of Charleston*, 271 Ill. 603.

In the case of *DeKam vs City of Streator*, 316 Ill. 123, the court had occasion to discuss questions closely allied to those that are involved in this suit, and at pages 129-130-131, the Court said:-

It is to be true that cities and villages prior to the 1837

act of incorporation had no power under the statute to furnish

public lights nor to fix the rates and collect for such ser-

vice, it would certainly follow that they would have no authority

to exercise power either within or without the limits of the

municipality.

The powers of a municipal corporation are only those which

are expressly granted or necessarily implied to make the grant of

public power effective, and it is not an express authority

by a contract or any legitimate corporate purposes from which the

power to enter into the contract may be implied, the contract is

void and cannot be enforced. The Eastern Illinois State Normal

School vs The City of Charleston, 271 Ill. 605.

Municipal corporations derive their authority and their power

directly from the General Assembly, and in order to legislate upon

it with reference to a particular subject or corporation they

must be able to legislate upon the whole subject matter.

City of Chicago vs City of Chicago, 214 Ill. 123.

Statutes granting powers to municipal corporations are strictly

construed, any fair or reasonable doubt being resolved against

the exercise of the power, and implied powers are those necessarily

incident to the express authority granted. Anna, et al. vs City

of Chicago, 214 Ill. 123. The Aberdeen-Whelan Coal Co. et al. vs The

City of Chicago, 214 Ill. 123.

A city cannot be estopped to repudiate a contract which it

has entered into unless it is shown that the contract is

in violation of the powers of a municipal corporation, and

the maintenance of a claim of estoppel would be conferring power

on the city to do unauthorized acts simply because it has done

acts and received the benefit. Eastern Illinois State Normal

School vs City of Charleston, 271 Ill. 605.

In the case of DeKalb vs City of Streator, 214 Ill. 123, the

"A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law can not at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the courts, *Botkin v. Osborne*, 39 Ill. 101; *Wells v. People*, 71 id. 532; *Board of Education vs Arnold*, 112 id. 11; *Penn v. Bornman*, 102 id. 523; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 id. 85; *Borough of Milford v. Milford Water Co.* 124 Pa. 610; *Berka v. Woodward*, 125 Cal. 119; *Levison v. Boaz*, 150 id. 185. The first three of these cases involved the statutory prohibition of the School law against the employment of any teacher in the public schools of the State who did not have at the time of his employment a teacher's certificate obtained under the provisions of the School Act. It was held in these cases that a contract with one who did not hold such a certificate was void and incapable of ratification; that the teacher could not recover from the district anything for his services though he had fully performed his contract; that a new contract made after the teacher had obtained a certificate and after the service was half performed, for the remaining half of the term at twice the rate of wages, was a mere evasion intended to accomplish indirectly what the law prohibited, and that payment to the teacher should be enjoined upon the application of a tax-payer. The next case, *Penn vs Bornman*, was a suit by the assignee of a bank whose charter provided that no director should become indebted to the bank, against one of its directors as indorser of bills of exchange, and it was held that the prohibition applied to the bank as well as the directors. It was said that the simple inquiry was, "Could the bank, in palpable violation of this express prohibition in its character, go on and contract, ad libitum, with its directors, and yet be permitted to recover just as though its charter contained no such provision? We put the question in this form for the reason we see no special circumstances in the case that take it out of the general rule

[illegible]

that all contracts made in violation of an express statutory provision are inoperative and void, and no recovery can be had upon them." The question of estoppel was considered in that case, as follows: "Upon a careful examination of the record we have been unable to discover any evidence of overreaching, fraud or bad faith on the part of Bornman upon which to found an estoppel, or, indeed, anything exceptionable in his conduct at all, outside of the simple fact that he, like the bank, was a party to an agreement prohibited by its charter, and if this of itself affords matter of estoppel which desprives his legal representatives of the defense of illegality in the contract, it is manifest such a defense could not successfully be interposed in any case where the agreement, as in this case, is simply prohibited by statute, and to so hold, would, under the pretense of construction, be, in effect, abrogating that provision of the charter by judicial legislation."

In many other cases contracts not prohibited by the express words of a statute but in violation of its terms have been held void, and it is a well established rule that where, from a consideration of all the provisions of the statute, the legislative intention clearly appears to declare an act unlawful no contract for the performance of that act can be enforced, and the rule applies to a contract to do an act contrary to the public policy of the State. *Shaffner v. Pinchback*, 133 Ill. 410; *Lake Fork Drainage District v. People*, 138 id. 87; *Bishop v. American Preserver's Co.* 157 id. 284; *Adams v. Brennan*, 177 id. 194; *Douthart v. Congdon*, 197 id. 349."

In addition to what has been stated above we are of the opinion that there is another reason that precludes a recovery in this case. July 1, 1913, the Municipal Ownership Act became effective. By Section 1, of the Act any city of this State, is given the power to acquire, construct, own and operate any public utility, the product for service of which, or a major portion thereof, is or is to be supplied to the city or its

at all contracts made in violation of an express statutory
provision are unenforceable and void, and no recovery can be had upon
them. The question of estoppel was considered in that case,
and it was held that upon a careful examination of the record we have
been unable to discover any evidence of overreaching, fraud or
other such factors on the part of the bank upon which to found an estoppel.
Indeed, anything exceptional in his conduct at all, outside
the simple fact that he, like the bank, was a party to an
agreement prohibited by its charter, and of this of itself
there is no estoppel which deprives his legal representa-
tives of the defense of illegality in the contract, it is
sufficiently clear that a defense could not successfully be interposed
in any case where the agreement, as in this case, is simply
prohibited by statute, and so no hold, under the pro-
vision of the statute, in effect, suggesting that provision
be "enforced by judicial legislation."

It is also clear that contracts not prohibited by the express
provisions of a statute but in violation of its policy are not
void, and it is a well established rule that where there is
violation of all the provisions of the statute, the law
active intention clearly appears to indicate an intent to
enforce the performance of that act can be enforced,
and the rule applies to a contract to do an act contrary to
the public policy of the State. *Shaffer v. Birmingham*, 133
U.S. 379; *Alabama Bank & Trust Co. v. United States*, 121 U.S.
100; *Alabama Bank & Trust Co. v. United States*, 121 U.S.
100; *Alabama Bank & Trust Co. v. United States*, 121 U.S.
100. In addition to what has been stated above we are of the
opinion that there is another reason why the contract is unenforceable.
This case, July 2, 1915, the National Commission on the
Federal Reserve System, in its report to the Federal Reserve
Board, given the power to regulate, supervise, control and operate the

inhabitants and to contract for, purchase and sell to private persons or corporations, the products or service of such utility, to fix rates and charges for the service rendered by such public utility, and to make all needful rules and regulations thereto.

Section 12 of the Act provides that the charges for the services rendered by means of any public utility of any city, shall be high enough to produce a revenue sufficient to bear all costs of maintenance and operation, to meet interest charges, on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity. The Act also provides that any city, may, without submitting the proposition to the electors thereof, to operate a public utility, sell electricity for heat, light or power within or without the limits of the city, generated from any electric lighting plant owned and operated by the city for its own use.

The record discloses that an ordinance effective January 1, 1916 was introduced in evidence by the City of Peru, fixing the rates for electricity used from the plant of said city. Section 1 of said ordinance is as follows:- That the rates for electrical current used by any and all consumers from the City Electric Plant is hereby fixed at the following rates: Then follows list of rates, being for the first 40 K. W. rate of 10 cents per K.W.; next 80 K.W. 9 cents; next 80 K.W. 8 cents; next 80 K.W. 7 cents; next 120 K.W. 6 cents; next 120 K.W. 5 cents; above that amount 4 cents per K.W.; said rates to run progressively.

Section 2 of said ordinance provides that all bills shall be due and payable on the first day of the month next succeeding the month in which said light was used.

It is provided in section three of said ordinance that if said bills are not paid within thirty days from the date the same are due under the terms of this ordinance the superintendent

... and immediately after the date to be
... and discontinuance of delivery of current to such place for
... which said current has not been paid.
Section 22 of said ordinance provides that all ordinances
and parts of ordinances in conflict herewith be repealed.
The adoption of the Municipal Ownership Act together with
the passage of the ordinance last above mentioned gave the
appellant the authority to operate the electric plant and furnish
light and power both within and without the municipality.
Municipalities under the Municipal Ownership Act are
limited in rates and charges for the product furnished by their
public utilities and cannot operate them at a profit to the
any extent as can private corporations, associations or
persons owning like utilities.
The rates were fixed by the ordinance two years before
the suit was instituted. The record discloses that the
appellants claim that they refused to pay for the power because
the rates charged by appellant; it further shows that the
power was turned off when they failed to pay the bills as pro-
vided by the ordinance. It is the contention of appellants
that they suffered the damages complained of because of the
refusal to furnish power. Had they paid the bills as provided
by the city there would have been no discontinuance of the
service and they would not have suffered the injuries complained
of. If they had an grievance against the city by reason
of the rates charged, the law provided a means for them to
have the question of rates reviewed. Municipal officers under
the Municipal Ownership Act cannot discriminate in rates or
in the amount and quality of rates to consumers if they dis-

If the city fixes its rates higher than the Statute provides, it can be compelled to reduce the rates, but until there has been an adjudication upon the question, as to whether its rates are in compliance with the Statute, it can not be held for damages, simply because of the bare contention on the part the consumer that its rates are higher than they should be.

Before appellees can recover in assumpsit it is incumbent upon them to establish a legal contract, a breach thereof, and the resultant damages. This they have failed to do.

A number of other questions are raised and discussed on the part of appellant but on account of the fact we have reached the conclusion as herein indicated that this cause should be reversed we will not extend this opinion by discussing other errors assigned. The judgment of the Circuit Court of LaSalle County is reversed and the cause remanded.

Reversed and Remanded.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk of the Court,
State of Illinois and keeper of the Records and
is a true copy of the opinion of the said Appellate Court
in my office.
Witness my hand and seal this
day of June, 1891.
at the year of our Lord one thousand

Rehearing Denied Sept 26, 1925

7403

Abstract Only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 637²

BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

THE HON. NORMAN

SEN. AUGUSTUS

SEN. THOMAS

JOHN

SEN. THOMAS

the Court was filled

The Federal Land Bank of
St. Louis, a corporation,

Pltf. in error,

vs.

John Weigle,

Def't. in error,

Error to the Circuit Court
of Lee County.

238 I.A. 637

Jett, P. J.

On March 1, 1917, James J. McBride and wife executed a trust deed to Elmer J. Countryman, trustee, creating a lien upon eighty acres of land in Lee County to secure the payment of three notes, only one of which for the principal sum of \$500.00 and maturing March 1, 1923, is involved in this suit. On April 5, 1918, Countryman, for its full value sold, assigned and delivered this note to defendant in error, John Weigle. On October 30, 1918, Countryman and wife being the then owners of said eighty acres of land, executed and delivered to plaintiff in error a note for \$1300.00 securing the payment of the same by a mortgage upon said eighty acres of land. This mortgage was filed for record on November 2, 1918 at four o'clock P.M. and on the same day five minutes earlier, Countryman had released of record the trust deed dated March 1, 1917. Upon a bill filed by plaintiff in error to foreclose its trust deed, defendant in error intervened and filed a cross bill in which he set up the fact that he was entitled to priority to the extent of the amount due on his \$500.00 note and upon a hearing the lower court so found and from that decree this writ of error is prosecuted.

There are no controverted questions of fact in this case. The Lee County National Farm Loan Association is duly incorporated under the Federal Farm Loan Act and E. J. Countryman was its Secretary and Treasurer and the draft representing the loan made by the plaintiff in error was sent to this association and as such secretary and treasurer E. J. Countryman received it and it is

The Federal Land Bank at
St. Louis, a corporation,

Plff. in error,

vs.

John Weigle,

Def. in error,

Jett, P. J.

2381A.637

Error to the Circuit Court
of Lee County.

On March 1, 1917, James J. McBride and wife executed a trust deed to Elmer J. Countryman, trustee, creating a lien upon eighty acres of land in Lee County to secure the payment of three notes, only one of which for the principal sum of \$500.00 and maturing March 1, 1928, is involved in this suit. On April 5, 1918, Countryman, for its full value sold, assigned and delivered this note to defendant in error, John Weigle. On October 30, 1918, Countryman and wife being the then owners of said eighty acres of land, executed and delivered to plaintiff in error a note for \$1200.00 securing the payment of the same by a mortgage upon said eighty acres of land. This mortgage was filed for record on November 2, 1918 at four o'clock P.M. and on the same day five minutes earlier, Countryman had released of record the trust deed dated March 1, 1917. Upon a bill filed by plaintiff in error to foreclose its trust deed, defendant in error intervened and filed a cross bill in which he set up the fact that he was entitled to priority to the extent of the amount due on his \$500.00 note and upon a hearing the lower court so found and that that decree was with error is presented.

There are no controverted questions of fact in this case. The Lee County National Farm Loan Association is duly incorporated under the Federal Farm Loan Act and E. J. Countryman was its Secretary and Treasurer and the draft representing the loan made

the contention of defendant in error that by so doing plaintiff in error made the Lee County National Farm Loan Association its agent to close up this transaction, and that defendant in error never having consented to the release of the trust deed securing his note, such release did not destroy the security of his note. Plaintiff in error, before closing its loan required the release of the prior trust deed and contends that this trust deed, under which defendant in error claims, having been duly released of record by one in no way its agent it was justified in relying upon the record and its lien is therefore superior to that of defendant in error.

A trustee, such as Countryman, had the power, as to third parties, such as plaintiff in error, to release the lien created by the trust deed which secured defendant in error's note, even though he did so without the consent of the holder of the indebtedness which the trust deed was given to secure and in violation of the obligations of his trust and such release may be made although the indebtedness secured by the trust deed has not matured at the time the release is executed. *Vogel v. Troy*, 232 Ill. 481. ~~xx~~

It was held in *Ogle v. Turpin*, 102 Ill. 148, that where one appeared of record as mortgagee and also became possessed of the fee to the land and released the mortgage before the notes were due, although the notes were outstanding in a third party's hands, the mere fact that the record showed they were not due was not, of itself, such notice as would affect a subsequent bona fide mortgages. Under these authorities unless the knowledge of Countryman can be held to be the knowledge of plaintiff in error there can be no ground for postponing its rights to those of defendant in error.

The Lee County National Farm Loan Association was selected by plaintiff in error to close up its loan to Countryman. The consideration passing from it to Countryman was sent by plaintiff in error to this Association. It looked to this Association to

the contention of defendant in error that it was not liable for the release of the first deed secured by its note, such release did not destroy the security of his note. Plaintiff in error, before closing its loan required the release of the prior trust deed and contended that this trust deed, under which defendant in error claims, having been duly released of record by one in no way its agent it was justified in relying upon the record and its lien is therefore superior to that of defendant in error.

A trustee, such as Countyman, had the power, as to third parties, such as plaintiff in error, to release the lien created by the first deed which secured defendant in error's note, even though he did so without the consent of the holder of the indebtedness which the first deed was given to secure and in violation of the obligations of his trust and such release may be made although the indebtedness secured by the first deed has not matured at the time the release is executed. Vogel v. Troy, 332 Ill. 481. It was held in Ogile v. Turbin, 102 Ill. 148, that where one

appeared of record as mortgagee and also became possessed of the fee to the land and released the mortgage before the notes were due, although the notes were outstanding in a third party's hands, the mere fact that the record showed they were not due was not of itself, such notice as would affect a subsequent bona fide mortgagee. Under these authorities unless the knowledge of Countyman can be held to be the knowledge of plaintiff in error there can be no ground for postponing its lien to that of defendant in error.

The Lee County National Farm Loan Association was selected by plaintiff in error to close up its loan to Countyman. The consideration passing from it to Countyman was not by plaintiff

see to it that the prior trust deed would be released and by so doing plaintiff in error constituted the Farm Loan Association its agent. Countryman was Secretary and Treasurer of this Association. He knew that by releasing this trust deed of record without the note held by Weigle being paid, he was committing a deliberate fraud upon Weigle. The knowledge which Countryman had was the knowledge of the Association of which he was the Secretary and Treasurer. I.I. & I. R.R. Co. vs. Swannell, 157 Ill. 616-629; 7 R.C.L. 653. The plaintiff in error must be held to have had notice of the rights of Weigle and having notice thereof the release of the trust deed by Countryman was not effective as to him.

It is not insisted that plaintiff in error did not act in good faith but the loss caused by the fraudulent and dishonest conduct of Countryman must fall upon either plaintiff in error or defendant in error. Plaintiff in error made the loss possible in selecting as its agent the Association of which Countryman was secretary and treasurer. In our opinion the decree of the lower court was right, is in accordance with the undisputed facts and the law governing this case, and it will therefore be affirmed.

Decree Affirmed.

... of defendant in error ...
see to it that the prior trust deed would be released and by so
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being plaintiff in error committed the Farm Loan Association
...
its agent. Countyman was Secretary and Treasurer of this
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...
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It is not material that plaintiff in error did not act in
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the law governing this case, and it will therefore be affirmed.
...
Decree Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

L. JOHNSON, Clerk of the Appellate Court
and keeper of the Records and Seal thereof
the opinion of the said Appellate Court in

I herewith set my hand and affix the

*Opinion suggestly modified and
Rehearing Denied Sept 26, 14*
7410 Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 637³

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Handwritten signature

OF THE APPELLATE COURT

the seventh day of
of our Lord one thousand nine hundred
of the Second District of the

Hon. NORMAN L. JONES, Presiding Justice

Hon. PARTLOW, Just

Hon. THOMAS M. Justice

remained, that afterwards, to-wit: On
the opinion of the Court was filed in
in the words and figures

and the words

Agenda No. 35

General No. 7410

Joseph G. Dingle, Appellee,

v.

Appeal from Circuit Court of
La Salle County.

Republican-Times Printing
Company, Appellant

238 I.A. 637

Jones, P. J:

Appellee, Dingle, filed a suit in assumpsit against the Republican-Times Printing Company and recovered a judgment in the circuit court of LaSalle County for \$677.25 and costs. This is an appeal from such judgment.

The appellant company is a corporation engaged in job work and newspaper printing in Ottawa, Illinois. F.M. Sapp is vice president and general manager thereof. The corporation was successor to a partnership and the stock of the corporation was paid in by turning over to the corporation assets of the co-partnership. The capital stock was \$20,000 and in opening the books of the corporation, the capital stock account was credited with that amount. On the debit side of the account were placed figures showing the value of the different properties turned in by the co-partners as stockholders. In following out this system of bookkeeping, it was ascertained that if all the bills receivable which belonged to the corporation were debited to the corporation, the debit account would exceed the capital stock account. In order to provide for this, and to make the accounts balance, the excess was placed in what was known as the "balance account". The amount of this excess was \$2858. The company was incorporated in 1916 and during the fiscal years ending in 1917, 1918, 1919 and 1920 this balance account increased until it amounted to approximately \$3500.

In February 1921 the company received a letter from the Collector of Internal Revenue, asking for information

General No. 1410

Volume No. 38

Appeal from Circuit Court of
in said County.

James A. Dingle, Appellant,

v.

Republic-Union Printing
Company, Appellee.

James, v. J. J.

Appellee, Dingle, filed a writ in assumpsit against

the Republic-Union Printing Company and recovered a judgment

in the circuit court of Cass County for \$27.25 and costs.

This is an appeal from such judgment.

The appellant company is a corporation engaged in job

work and newspaper printing in Ottawa, Illinois. T. M. Bagg

is vice president and general manager thereof. The corporation

was successor to a partnership and the stock of the corporation

was paid in by turning over to the corporation assets of the

partnership. The capital stock was \$25,000 and in paying

the stock of the corporation, the capital stock account was

credited with that amount. On the debit side of the account

were placed figures showing the value of the different properties

turned in by the co-partners as stockholders. In following

out this system of bookkeeping, it was ascertained that if all

the bills receivable which belonged to the corporation were

debited to the corporation, the debit account would exceed

the capital stock account. In order to provide for this, and

to make the accounts balance, the excess was placed in what

was known as the "balance account". The amount of this excess

was \$125. The company was incorporated in 1913 and during

the fiscal years ending in 1914, 1915, 1916 and 1920 this

balance account increased until it amounted to approximately

\$2500.

In January 1921 the company received a letter from

238 I. A. 637

concerning the "balance account", as the same appeared in the tax return for the year 1918. Because of this letter and of the possibility that the income tax would be materially increased if the company was charged with the amount in the balance account as profit, the officers of the company considered having an audit of their books made and accordingly talked to an auditor of Chicago, who happened to be in Ottawa at the time. No engagement resulted from this conference.

Appellee was then employed by the First National Bank of Ottawa to assist its patrons in making out their income tax returns. He also assisted certain individuals and corporations with their tax ~~r~~eturns. Among these whom he had assisted in 1921 was the appellant company, and in doing this he had examined the books of 1920. Appellant, through its bookkeepers, was unable to attempt a satisfactory reply to the Internal Revenue Collector's Inquiry. It thereupon engaged appellee to make an audit of its books and to file an amended tax return. Appellee performed the services for which he was employed. A disagreement arose between the parties as to the amount of compensation due and this suit is the result.

For the work appellee did for appellant prior to entering into the contract in question, he received \$2.50 per hour. When arrangements were being made for the employment of appellee, to make the audit heretofore mentioned, Mr. Sapp inquired of appellee what would be the time consumed and the cost. There was some conversation about a contingent fee, but that proposition was not agreed to. Sapp testified appellee Dingle told him that if the books for the years 1917, 1918 and 1919 had been kept in the same way that the books for 1920 had been kept, and which he had seen when making up the 1921 tax return, he could do the work for \$240. This price was based upon the ~~girl~~ wages of a girl employed to take off the summaries from the journals and cash book and to assemble data for Dingle's use. The latter estimated that it would take

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tax return for the year 1918. Because of this letter and of
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had been kept, and which he had seen when making up the 1921
tax return, he could do the work for \$240. This price was based

her one day for each month of the four years, or forty-eight days in all, and that he would consume about six days at the rate of \$20 per day or \$2.50 per hour. Sapp claims he declined to accept this proposition on the ground that the company could not afford the expense, but stated there was a girl in the office whose services were soon to be dispensed with and who could be employed for \$12.00 per week, and if the appellee could figure it out so that he could do the entire work for \$200, he could go ahead. Appellee declined to accept this proposition and stated that he believed his time was worth \$20 per day. To this Sapp replied that he did not want appellee to cut his rate: that Dingle could go ahead with the work; make his charge as reasonable as possible; but the cost must not exceed the original estimate.

Appellee's version is that after he had refused to accept any of the propositions made to him, Sapp told him to proceed with the work, and to make the charge as reasonable as possible. Whereupon appellee left the Republican-Times office and made plans for the commencement of his work, which he immediately undertook, with the help of Mrs. Gonigam, the lady whom Sapp had recommended.

There were discussions between the parties as to the necessity for the audit to clear up the situation concerning the balance account, so that the amended tax return would show that the company was not liable for taxes upon said balance. The tax and penalties thereon, as estimated by the parties, would be about \$1500. The proposition for a contingent fee made by Sapp to Dingle contemplated the payment to Dingle of one-half of this amount, if it could be saved. Dingle's work was completed. He disclosed the errors in appellant's methods of bookkeeping. He demonstrated that the company was not liable for the payment of a tax on said "balance account". He installed a new system of bookkeeping for the company; instructed the

her one day for each month of the four years, or forty-eight days in all, and that he would consume about six days at the rate of \$20 per day or \$12.50 per hour. Gapp claims he declined to accept this proposition on the ground that the company could not afford the expense, but stated there was a girl in the office whose services were soon to be dispensed with and who could be employed for \$12.00 per week, and if the appellee could figure it out so that he could do the entire work for \$20 per day, he would go ahead. Appellee declined to accept this proposition and stated that he believed his time was worth \$20 per day. To this Gapp replied that he did not want appellee to cut his water; that Dingle could go ahead with the work; and his charges as reasonable as possible; but the cost must not exceed the original estimate.

Appellee's version is that after he had refused to accept any of the propositions made to him, Gapp told him to proceed with the work, and to make the charge as reasonable as possible. Whereupon appellee left the Republican Times office and made plans for the commencement of his work, which he immediately undertook, with the help of Mrs. Johnson, the lady who had been recommended.

There was discussion between the parties as to the necessity for the audit to clear up the situation concerning the balance account, so that the amended tax return would show that the company was not liable for taxes upon said balance. The tax and penalties thereon, as estimated by the parties, would be about \$500. The proposition for a contingent fee made by Gapp to Dingle contemplated the payment to Dingle of one-half of this amount, if it could be saved. Dingle's work was completed. He disclosed the errors in appellee's methods of bookkeeping. He demonstrated that the company was not liable for the payment of a tax on said "balance account". He in-

^{the}
 ^ bookkeeper concerning it; made out an amended tax return, which was satisfactory to the Collector of Internal Revenue; discovered that the company had overpaid the government \$210 in taxes; filed a claim for a refund thereof, which claim was allowed; and he paid out of his own cash \$85.40 for necessary expenses. In turn, he has been paid by appellant \$48.

Appellant offers six different reasons why the judgment should be reversed and we will discuss them in the order which he has suggested. The first objection is that the court permitted appellee, over the objection of appellant to testify how the company's books for the years 1917, 1918, and 1919 were kept as compared with the system of bookkeeping in 1920. It will be remembered that Sapp contended that he undertook to place a limit upon the cost of the audit and that Dingle, in making his estimate of cost, inquired if the bookkeeping system for 1917, 1918 and 1919 was the same as that employed in 1920. This inquiry was a material one, and even under appellant's theory of the contract, appellee would not be limited to a recovery of \$200, if the system of bookkeeping for the first three years was such that it involved more labor in making an audit than the appellee could reasonably anticipate from the information he had received from Sapp. It is therefore clear that the testimony of appellee was competent and that the court did not err in admitting it.

The next suggestion of error is that the court refused to admit the books of account in evidence and that appellee was permitted to testify as to the deductions and conclusions he had made from his examination. It appears from the record that the trial of this case was practically finished before the adjournment of court in the afternoon and that the next morning and immediately before the defendant rested its case, its attorney made the following statement to the court: "I said last night, I did not know, I did not think I had any further evidence at that time.

... it; made out an amended tax return, which
... the collector of Internal Revenue; discover-
... the company had overpaid the government \$210 in taxes;
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... he paid out of his own cash \$25.40 for necessary expenses.
... he has been paid by appellant \$48.
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... over the objection of appellee to testify
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... with the system of bookkeeping in 1920. It
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... the audit and that Dingle, in
... of cost, inquired if the bookkeeping system
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... and even under appellant's
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... that it involved more labor in making
... the appellee could reasonably anticipate from
... he had received from Sapp. It is therefore
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... in admitting it.
... that the court refused
... in evidence and that appellee
... as to the deductions and conclusions
... It appears from the record
... this case was practically finished before
... in the afternoon and that the next
... immediately before the defendant rested the case,

5.

I now offer all of these books in evidence." The court refused to admit them. In doing so we think no error was committed. Technically they may come under the "best evidence" rule, but this rule has been somewhat modified from necessity. Sheets from looseleaf ledgers may now be admitted in evidence without the necessity of producing the entire record, *Wylie v. Bushness*, 277 Ill. 484; 22 C.J. 870, and so, not only because of the voluminous mass of items sometimes contained in an account, but from force of the fact that such evidence would tend to confuse rather than to enlighten the jury, deductions of competent persons, who have examined the records may be offered in evidence, where the results of such examination are vital or material. In *People v. Gerold* 265 Ill. 448, an expert testified as to his conclusions from an examination made of various documents, and the Supreme Court on page 265 of the opinion said "Where the originals consist of numerous documents, books, papers, or records, which cannot conveniently be examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any competent person who has examined the documents, provided the result is capable of being ascertained by calculation. . . . In many instances any other method would cause a great loss of time and tend to confuse the jury. In a trial involving so many details and occupying as much time as the case under consideration, expert testimony as to what was shown by an examination of the books, accounts and records was the only mode of presenting an intelligent view of the case to the jury." The wisdom of the modified rule is apparent and its application in the present case was exceedingly proper. To have admitted all the books of account would have unnecessarily encumbered the record, and could not have failed to result in confusing the jury.

The third contention is that the ~~XXXXX~~^{XX} verdict is

I am after all of these books in evidence." The court re-
sponded to admit them. In doing so we think no error was
committed. Technically they may come under the "best evidence"
rule, but this rule has been construed so as to require
evidence from looseleaf ledgers may now be admitted in evidence
without the necessity of producing the entire record. *Wylie*
v. Buchanan, 277 Ill. 484; 82 O.J. 870, and so, not only
because of the voluminous mass of items sometimes contained
in an account, but from force of the fact that such evidence
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Statements of competent persons, who have examined the records
may be offered in evidence, where the results of such exami-
nation are vital or material. In *Boyle v. Boyle*, 265 Ill. 448,
an expert testified as to his conclusions from an examination
made of various documents, and the Supreme Court on page 265
of the opinion said "Where the originals consist of numerous
statements, books, papers, or records, which cannot conveniently
be examined in court, and the fact to be proved is the general
result of an examination of the whole collection, evidence
may be given as to such result by any competent person who
has examined the documents, provided the result is capable of
being ascertained by calculation. . . . In many instances any
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fuse the jury. In a trial involving so many details and
occupying as much time as the case under consideration, expert
testimony as to what was shown by an examination of the books,
accounts and records was the only mode of presenting an in-
dependent view of the case to the jury." The wisdom of the
admitted rule is apparent and its application in the present
case was undoubtedly proper. To have admitted all the books
at present would have unnecessarily encumbered the record, and
would not have failed to result in confusing the jury.

manifestly against the weight of the evidence. The appellee and the said Sapp were the principal witnesses in the case. They were the only ones who testified in regard to the conversations out of which the agreement arose. The jury and the trial court had opportunity to see and observe them and we do not feel that we can justly disturb the verdict of the jury and the judgment of the court on the ground of this contention.

The fourth objection is that the court erred in giving appellee's first and second instructions. The complaint made of the first instruction is that it submitted to the jury the question as to whether or not the parties entered into a contract. In our judgment the instructions is not open to this criticism, but even if it were, it would not be deemed reversible error for the reason that both parties admitted there was a contract. There was no dispute about that proposition. The dispute was over the terms of the contract. The complaint against the second instruction is that it was modified by the court by submitting to the jury whether or not the audit was made for a special purpose. Appellant is in no position to complaint of this instruction because of such modification. It raised the issue itself by its affidavit of defense wherein it was stated that the books of account were to be audited, together with the income tax returns for the said four years and that the audit was to be used in making an amended tax return. There is no doubt about the purpose of the audit, and the modification of the instruction by the court could do no possible harm. What we have said with reference to the modification of the second instruction is applicable to the court's modification of appellant's sixth and seventh instructions, and this also disposes of appellant's objection number five.

The sixth and last objection is that the attorney for appellee, in his address to the jury informed it that the attorney for appellant would draw the instructions that the

...the only case in which the agreement was made. The jury and the
verdicts out of which the agreement arose. The jury and the
trial court had opportunity to see and observe them and
to see that no one had tampered with the verdict of the jury
and the judgment of the court on the ground of this agreement.
The fourth objection is that the court erred in giving
appellate's first and second instructions. The complaint made
of the first instruction is that it admitted to the jury the
question as to whether or not the parties entered into a con-
tract. In our judgment the instruction is not proper in this
situation, but even if it were, it would not be binding on
the jury for the reason that with proper instructions there
was a contract. There was no dispute about this.
The dispute was over the terms of the contract. The complaint
against the second instruction is that it was modified by the
court by submitting to the jury whether or not the audit was
made for a special purpose. Appellant is in no position to
complain of this instruction because of such modification.
It raised the issue itself by its affidavit of defense wherein
it was stated that the books of account were to be audited,
together with the income tax returns for the said four years
and that the audit was to be used in making an amended tax
return. There is no doubt about the purpose of the audit, and
the modification of the instruction by the court could do no
possible harm. What we have said with reference to the modi-
fication of the second instruction is applicable to the third
modification of appellant's first and second instructions,
and this also applies to appellant's objection number five.
The fifth and last objection is that the attorney for

court would read in its behalf. In Wible v. I.C.R. R. Co. 147 Ill. App. 187 such a remark was severely criticised, and justly so. While it is true that instructions are usually written by counsel for the respective parties, they are, nevertheless, the instructions of the court as much as though the court had prepared them, and any suggestion by counsel, which tends to lessen the regard which the jury ought to have for the instructions, is always to be condemned. In some instances such a course may constitute reversible error, but in this case as in the Wible case, the error is not grave enough to cause a reversal.

Judgment affirmed.

(see also next page)

court would read in the result. In *Wible v. T.G.R. R. Co.*

and *Ill. 1901*. The court severely criticized, and

twice so. This is in fact the instruction the court

writes by counsel for the responsive parties, they are,

nevertheless, the instructions to the court as such as though

the court had prepared them, and any suggestion by counsel,

which tends to lessen the regard which the jury ought to have

for the instructions, is always to be condemned. In some

instances such a course may constitute reversible error,

but in this case as in the *Wible* case, the error is not

grave enough to require a reversal.

Reversed and remanded.

Wible v. T.G.R. R. Co.

Wible v. T.G.R. R. Co.

Since the opinion in this case was filed, an opinion of the Appellate Court of the First District in the case of Hochchild v. Goddard Tool Company, 233 Ill. App. 56, has been published and counsel for appellant suggests that the rule as to the admission of books of account, as therein laid down, is not in harmony with the rule announced by this court. We have carefully examined the opinion in the Hochchild case, as well as the other authorities cited, and we conclude that the rule and its application are the same in both cases. In the case at bar, the books had been in the courtroom throughout the trial and were accessible to both parties. It is not contended that the offer of admission was for the purpose of aiding in the cross-examination of appellee or that the books, if admitted, would contradict the testimony or deduction of appellee. The offer seems to have been an after-thought and without any real objective. It does not appear that appellant was deprived of any right, or that it was in any manner prejudiced by the ruling of the court. We are therefore constrained to adhere to our original opinion in this case.

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Since the opinion in this case was filed, an opinion of the Appellate Court of the First District in the case of *Hoschchild v. Goddard Tool Company*, 238 Ill. App. 55, has been published and counsel for appellant suggests that the rule as to the admission of books of account, as therein laid down, is not in harmony with the rule announced by this court. We have carefully examined the opinion in the *Hoschchild* case, as well as the other authorities cited, and we conclude that the rule and its application are the same in both cases. In the case at bar, the books had been in the courtroom throughout the trial and were accessible to both parties. It is not contended that the offer of admission was for the purpose of aiding in the cross-examination of appellee or that the books, if admitted, would contradict the testimony or deduction of appellee. The offer seems to have been an after-thought and without any real objective. It does not appear that appellant was deprived of any right, or that it was in any manner prejudiced by the ruling of the court. We are therefore constrained to adhere to our original opinion in this case.

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STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JOHN W. JOHNSON, Clerk of the Appellate
Court of Illinois, and keeper of the Records and Seal
of the said Appellate Court

I herewith set my hand at

7442

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

... on Thursday, the seventh day
of the year of our Lord one thousand eight hundred and
ninety five, within and for the second District

I

Hon. Mr. NORMAN L. JONES, Pres.
Hon. AUGUSTUS A. PARTLOW, Justice.
THOMAS M. JETT, Justice.
JOHNSON, Clerk.
SHERIFF, Sheriff.

IT REMEMBERED, that afterwards, to-wit: Of
the opinion of the Court was filed in
said Court; in the words and

James M. Longshore,

appellee,

vs.

Appeal from Circuit Court

of Iroquois County.

Joseph Fanyo,

appellant,

238 I.A. 637

Jett, P.J.

This is an action in assumpsit brought by James M. Longshore, appellee, against Joseph Fanyo, appellant, to recover the value of a Studebaker Special Six Touring car equipped with certain extra equipment. A trial was had and the jury returned a verdict in favor of appellee for the sum of \$1397.00 and appellant prosecutes this appeal.

The original declaration consists of two special and the common indebitatus counts. The 1st and 2nd counts of the original declaration alleged the failure of appellant to deliver the automobile mentioned in said declaration equipped with certain equipment upon said automobile and said extra equipment are the subject matter of the contract on which this suit is brought. Under these counts appellee sought to recover from appellant damages for the alleged failure to deliver said automobile equipped with said extra equipment. To the original declaration appellant pleaded the general issue.

At the November Term, 1923, appellee by leave of the court filed an amended declaration consisting of two special and the common indebitatus counts. The 1st count alleges that on January 9, 1922, appellant procured appellee to sign an order partly written and partly printed addressed to appellant for one automobile Studebaker Special Six Touring model, to be delivered by appellant to appellee on or about January 9, 1922, together with certain extra equipment described in said order as one cord casing, tube, a front and a rear bumper all for the agreed price of \$1534.05; that it was further in and by said order provided

2381.A.637

Appeal from Circuit Court
of Knox County.

James M. Longshore,
appellee,

vs.

Joseph Henry,
appellant.

Jeff. P. J.

This is an action in assumpsit brought by James M. Longshore, appellee, against Joseph Henry, appellant, to recover the value of a Studebaker Special Six Touring car equipped with certain extra equipment. A trial was had and the jury returned a verdict in favor of appellee for the sum of \$1337.00 and appellant prosecutes this appeal.

The original declaration consists of two special and the common indebitatus counts. The first and second counts of the original declaration alleged the failure of appellant to deliver the automobile mentioned in said declaration equipped with certain equipment upon said automobile and said extra equipment are the subject matter of the contract on which this suit is brought. Under these counts appellee sought to recover from appellant damages for the alleged failure to deliver said automobile equipped with said extra equipment. To the original declaration appellant pleaded the general issue.

At the November Term, 1925, appellee by leave of the court filed an amended declaration consisting of two special and the common indebitatus counts. The first count alleges that on January 2, 1925, appellant procured appellee to sign an order written and partly printed addressed to appellant for one mobile Studebaker Special Six Touring model, to be delivered by appellant to appellee on or about January 4, 1925, together with certain extra equipment described in said order as one complete type of a Studebaker Special Six Touring model.

that if said automobile was not ready for delivery as specified the cash depos it should be returned by appellant to appellee on demand together with the used car deposited in part payment or the proceeds thereof, if sold; that it was further provided in said order that the title to said Studebaker automobile should remain in appellant until conveyed; that on said date and in accordance with said order appellee delivered to appellant in payment of said purchase price of said Studebaker automobile, one new Chevrolet motor car and equipment, accepted by appellant at a valuation of \$1018.20, and his note for the principal sum of \$450 and his check for the sum of \$65.85; that he had paid said note and check and said settlement and order were accepted by appellant and that appellant wrote such acceptance of said order upon the face thereof and signed the same; that appellant promised appellee to deliver him a Studebaker automobile, as so ordered, with the said extra equipment attached thereto but he refused to do so; that appellee had demanded of appellant the return to him of his cash deposit, note and Chevrolet automobile and that appellant had refused to do so.

In the second count of the amended declaration appellee alleges that appellant on January 9, 1922, sold appellee one Studebaker Special Six Touring model automobile with certain extra equipment consisting of one cord casing, one inner tube, one front and one rear bumper for which automobile so equipped appellee agreed to, and did pay, the sum of \$1534.05 by delivering to appellant appellee's new Chevrolet motor car at an agreed price of \$1018.20, his note for \$450 and his check for \$65.85; that in consideration of such payment, appellant agreed to deliver to appellee said Studebaker automobile so equipped; that it was agreed between them that if said Studebaker motor car was not ready for delivery as specified the deposit should be returned to appellee on demand, together with the used car deposited in part payment, or the proceeds of the sale thereof, if sold; that appellant accepted the

that if said automobile was not ready for delivery as specified the cash thereon it should be returned by appellee to appellant on demand together with the cash so specified in said order or the proceeds thereof, if sold; that it was further provided in said order that the title to said Studebaker automobile should remain in appellant until conveyed; that on said date and in accord- with said order appellee delivered to appellant in payment of said purchase price of said Studebaker automobile, one new Chevrolet motor car and equipment, accepted by appellant at a valuation of \$1018.30, and his note for the principal sum of \$450 and his check for the sum of \$65.85; that he had paid said note and check and said settlement and order were accepted by appel- lant and that appellee wrote such acceptance of said order upon the face thereof and signed the same; that appellant promised appellee to deliver him a Studebaker automobile, as so ordered, with the said extra equipment attached thereto but he refused to do so; that appellee had demanded of appellant the return to him of his cash deposit, note and Chevrolet automobile and that appellant had refused to do so.

In the second count of the amended declaration appellee alleges that appellant on January 3, 1932, with appellee one Studebaker Special Six touring model automobile with certain extra equipment consisting of one cord casing, one inner tube, one front and one rear bumper for which automobile no equipped appellee agreed to, and did pay, the cash of \$1018.30 as set forth in said order, appellee's new Chevrolet motor car at an agreed price of \$1018.30, his note for \$450 and his check for \$65.85; that in consideration of such payment, appellee agreed to deliver to appellee said Studebaker automobile so equipped; that it was agreed between them that if said Studebaker motor car was not ready for delivery as specified the deposit should be returned to appellee on demand.

said payment from appellee and that said agreement between the parties was evidenced by an instrument partly written and partly printed, signed by them on January 9, 1922; that by reason thereof appellant became liable to deliver to appellee said Studebaker automobile so equipped and in consideration thereof undertook, and promised to deliver the same so equipped to the latter; that appellant although requested had not delivered to appellee said Studebaker automobile but had refused so to do and had not returned to appellee said Chevrolet motor car, note and cash and had refused to return the same although demand had been made on him therefor.

The common indebitatus counts were for goods sold and delivered, goods bargained and sold, money lent, money expended, money received, interest and account stated.

A Copy of the instrument sued on was filed with such amended declaration. After the filing of the amended declaration appellee filed a bill of particulars stating that he had entered into an agreement with appellant substantially as set forth in the 1st and 2nd counts of the amended declaration and states that a copy of the agreement entered into between appellee and appellant is attached to and made a part of said bill of particulars; that at the date of the making of said agreement appellant did not have all of said equipment at his place of business and was required to retain said Studebaker car until it could be completely equipped according to the agreement of the parties; that he never delivered said Studebaker automobile or any Studebaker automobile so equipped to appellee, although demand for the same was made by appellee on appellant; that said Chevrolet car was destroyed by fire when the garage of appellant was burned in January, 1922; that appellee had demanded of appellant the delivery of said Studebaker automobile so equipped or the return to him of the said price paid by him and that appellant refused to comply with either request and that said action was brought to recover said purchase price. Thereafter

said payment from appellee and that said agreement between the parties was evidenced by an instrument partly written and partly printed, signed by them on January 9, 1932; that by reason thereof appellant became liable to deliver to appellee said Studebaker automobile so equipped and in consideration thereof undertook, and promised to deliver the same so equipped to the latter; that appellant although requested had not delivered to appellee said Studebaker automobile but had refused so to do and had not returned to appellee said Chevrolet motor car, note and cash and had refused to return the same although demand had been made on him therefor.

The common indebtedness counts were for goods sold and delivered, goods bargained and sold, money lent, money expended, money received, interest and account stated.

A copy of the instrument sued on was filed with such amended declaration. After the filing of the amended declaration appellee filed a bill of particulars stating that he had entered into an agreement with appellant substantially as set forth in the last and last parts of the amended declaration and states that a copy of the agreement entered into between appellee and appellant is attached to and made a part of said bill of particulars; that at the date of the making of said agreement appellant did not have all of said equipment at his place of business and was required to retain said Studebaker car until it could be completely equipped according to the agreement of the parties; that he never delivered said Studebaker automobile or any Studebaker automobile so equipped to appellee, although demand for the same was made by appellee on appellant; that said Chevrolet car was delivered by him when the return of appellant was turned in January, 1931; that appellee had demanded of appellant the delivery of said Studebaker automobile so equipped on the return to him of the said cash and note.

appellant filed the plea of the general issue to the amended declaration. The cause was submitted to a jury on the issue being joined as above indicated.

There is no controversy so far as we have been able to ascertain but that the full purchase price was paid appellant by the appellee and appellant was to deliver for such purchase price to appellee the following articles: a Studebaker car; a cord case; a tube; a front bumper and a rear bumper. No contention is made by appellant that he did deliver or turn over to appellee at any time all of the said articles as above stated and which were purchased and paid for by appellee. On the trial it was the contention of appellee that delivery had not been made to him of any of the articles which he purchased. It was the contention of appellant that delivery had been made of everything except the tube and the question of fact was submitted to the jury.

The evidence shows that on Sunday January 8, 1922, appellee and his son-in-law went to appellant's garage in response to an invitation by appellant and looked at a Studebaker car then in the salesroom. This car did not have the extra equipment attached to it. It appears that at the time the appellee and his son-in-law were at the garage of the appellant it was about 10 o'clock in the morning. At about 3 o'clock that afternoon appellant took appellee and son-in-law for a ride in the Studebaker car. Appellee desired to show the car to his family and appellant consented, stating to appellee at the time, you will be responsible for the car while you have it out. Appellee brought the car back to appellant's garage in about one hour. Appellee then stated that he would return to the garage the next morning and on Monday morning January 9, appellee returned to the garage of appellant and the order for the car was signed together with the note and check. Appellee took the note home for his wife to sign.

It is the contention of appellee that at the time the order

appellant filed the plea of the general issue to the amended declaration. The case was submitted to a jury on the issue being joined as above indicated.

There is no controversy so far as we have been able to ascertain but that the full purchase price was paid appellant by the appellee and appellant was to deliver for such purchase price to appellee the following articles: a Studebaker car; a cord case; a tube; a front bumper and a rear bumper. No contention is made by appellant that he did deliver or turn over to appellee at any time all of the said articles as above stated and which were purchased and paid for by appellee. On the trial it was the contention of appellee that delivery had not been made to him of any of the articles which he purchased. It was the contention of appellant that delivery had been made of everything except the tube and the question of fact was submitted to the jury.

The evidence shows that on Sunday January 8, 1922, appellee and his son-in-law went to appellant's garage in response to an invitation by appellant and looked at a Studebaker car then in the showroom. This car did not have the extra equipment attached to it. It appears that at the time the appellee and his son-in-law were at the garage of the appellant it was about 10 o'clock in the morning. At about 5 o'clock that afternoon appellant took appellee and son-in-law for a ride in the Studebaker car. Appellee desired to show the car to his family and appellant consented, stating to appellee at the time, you will be responsible for the car while you have it out. Appellee brought the car back to appellant's garage in about one hour. Appellee then stated that he would return to the garage the next morning and on Monday morning January 9, appellee returned to the garage of appellant and the order for the car was signed together with the note and check. Appellee took the note home for his wife to sign.

was handed to him to be signed the appellant stated, "Jim, I find I will have to send and get the brackets for the front bumper. I haven't any here". Mrs. Fanyo, wife of the appellant who was then in the office was the bookkeeper for the appellant also said, "We will have to get the extra tire too". This is disputed, however, by appellant in his testimony. Appellee testified that he stated to appellant that he must have the car by Saturday as he was going to Gary. Appellant stated he would call appellee as soon as the car was ready. Nothing further was done by appellee and the next night the garage burned and destroyed the Studebaker car and the Chevrolet car which appellee had turned in on the purchase price of the Studebaker.

It is the contention of appellant that the order in question was not an entire contract but was separable and divisible; that there were two separate and distinct contracts made at the same time included in the same instrument; one for the sale of a Special Six Studebaker motor car with standard equipment described in the manufacturer's catalogue and one for the sale of a front and a rear bumper and one extra cord casing and tube; that the motor car so sold was then in appellants' garage equipped with said standard equipment and in a deliverable state in accordance with the provisions of said contract of sale and was in the same condition when the purchase price therefor was paid by appellee to appellant and such payment was accepted by the latter in full payment of such purchase price; that in said contract of sale of said motor car, appellant had agreed that in the event that said motor car was not ready for delivery as therein specified he would return to appellee on demand, the Chevrolet motor car delivered by appellee to appellant in part payment of the purchase price for said Studebaker motor car, or the proceeds thereof if the same had been sold by appellant; that such agreement to return said Chevrolet motor car, on such demand, was subject to the implied condition that said Chevrolet motor car

was wanted to him to be signed the appellant stated, "Jim, I find I will have to send and get the brackets for the front bumper. I haven't any here". Mrs. Tenyo, wife of the appellant who was then in the office was the bookkeeper for the appellant also said, "We will have to get the extra tire too". This is disputed, however, by appellant in his testimony. Appellee testified that he stated to appellant that he must have the car by Saturday as he was going to Gary. Appellant stated he would call appellee as soon as the car was ready. Nothing further was done by appellee and the next night the garage burned and destroyed the Studebaker car and the Chevrolet car which appellee had turned in on the purchase price of the Studebaker.

It is the contention of appellant that the order in question was not an entire contract but was separable and divisible; that there were two separate and distinct contracts made at the same time included in the same instrument; one for the sale of a Special Six Studebaker motor car with standard equipment described in the manufacturer's catalogue and one for the sale of a front and a rear bumper and one extra cord casing and tube; that the motor car so sold was then in appellant's garage equipped with said standard equipment and in a deliverable state in accordance with the provisions of said contract of sale and was in the same condition when the purchase price therefor was paid by appellee to appellant and such payment was accepted by the latter in full payment of such purchase price; that in said contract of sale of said motor car, appellant had agreed that in the event that said motor car was not ready for delivery as therein specified he would return to appellee on demand, the Chevrolet motor car delivered by appellee to appellant in part payment of the purchase price for said Studebaker motor car, or the proceeds thereof if the same had been sold by appellee; that when appellant to return said Chevrolet motor car on such demand, was

6.

should still be in existence at the time such demand should be made; that said Chevrolet motor car was destroyed by fire before demand for its return was made and therefore no longer in existence at that time, and its return no longer possible; that by the destruction of said Chevrolet motor carx before said demand, appellant was relieved of all obligation to perform his agreement to return the same, and from all liability for his failure to perform such agreement and that appellee could not recover from appellant any part of the amount at which said Chevrolet motor car was turned over to the latter in part payment of the purchase price of said Studebaker motor car, or the fair cash market value of said Chevrolet motor car.

It is argued by appellant that the fact the said order included a contract for the sale of said Studebaker motor car with standard equipment, and also for the sale of said extra equipment and that such sales were included in said order at the same time, does not, of itself, establish an entire and indivisible contract of sale. The contract is as follows:

Watseka 1-9-22

To Joseph Fanyo

Dealer or Branch

Please enter my order for one Studebaker Special Six Touring Model, with standard equipment described in the manufacturer's catalog, except as otherwise specified herein, to be delivered on or about 1-9-22. I agree to pay the balance of the purchase price upon delivery of car or to give such security for payment as you may require. If the balance of the full purchase price is not settled by me within fifteen days after notice that said motor car is ready for delivery, you may cancel this order and retain all payments made by me as liquidated damages. If said motor car is not ready for delivery as specified, the dash deposit shall be returned to me on demand together with used car deposited in part payment, if any, or proceeds thereof, if sold, and you shall not be liable for damages for non-delivery.

The title to and right of possession of said motor car shall remain in you until con-

It is agreed by appellant and respondent that the motor car should still be in existence at the time of the sale. It is further agreed that said Chevrolet motor car was destroyed by fire before demand for its return was made and therefore no longer in existence at that time, and its return no longer possible; that by the destruction of said Chevrolet motor car before said demand, appellant was relieved of all obligation to perform his agreement to return the same, and from all liability for his failure to perform such agreement and that appellee could not recover from appellant any part of the amount of which said Chevrolet motor car was turned over to the latter in part payment of the purchase price of said Studebaker motor car, or the fair cash market value of said Chevrolet motor car. It is agreed by appellant and respondent that the sale included a contract for the sale of said Studebaker motor car with standard equipment, and also for the sale of said extra equipment and that such sales were included in said order at the same time, does not of itself, establish an entire and indivisible contract of sale. The contract is as follows:

Wataaka 1-2-22

Please enter my order for one Studebaker Special Six Touring Model, with standard equipment described in the manufacturer's catalog, except as otherwise specified herein, to be delivered on or about 1-2-22. I agree to pay the balance of the purchase price upon delivery of car or to give such security for payment as you may require. If the balance of the full purchase price is not settled by me within fifteen days after notice that said motor car is ready for delivery, you may cancel this order and retain all payments made by me as liquidated damages. If said motor car is not ready for delivery as specified, the same shall be returned to me on demand for return, with and without interest in part payment, if any, or pro-rata refund, if sold, and you shall not be

veyed or until the full purchase price is paid in money. I agree to accept as my agent and employee any operator furnished by you for instructions in the operation of said motor car.

It is understood that there are no warranties or representations, express or implied, not specified herein, respecting the goods hereby ordered. This order is not binding upon you until accepted and signed by your Retail Manager.

Price of Motor Car with Standard Equipment,
F.O.B. Factory, F.O.B. Watseka,

\$1580.00

Extra equipment at following prices

| | | |
|---------------------------|-------|-------|
| Cord case | 32.40 | |
| Tube \$3.70, front bumper | 32.00 | |
| Rear bumper | 32.00 | 68.10 |

Freight and Handling Expense

For the motor car and equipment as above specified, subject to your standard Warranty and standard service policy as printed on the back of this order, I agree to pay the sum of \$1648.10

In payments as follows:

By cash deposit accompanying this order
By one new Chevrolet Motor Car which I agree to deliver to you on or before---
192--, free and clear of all liens and encumbrances and in the same condition as at present, reasonable wear and tear excepted

| | |
|-----------|------------------|
| Equipment | 965.00 |
| | 53.20 |
| | <u>\$1018.20</u> |

Balance to be paid to you upon delivery of car 515.85

It is agreed that no change, alteration, interlineation or verbal agreement of any kind shall be effective to change, alter or amend the printed terms of this agreement, the Standard Warranty or the Standard Service Policy.

Accepted 1-9-22

James M. Longshore
Purchaser

Joseph Fanyo
(Dealer or Branch)

It will be observed that this contract states, "Please enter my order for one Studebaker Special Six Touring Model with standard equipment described in the manufacturer's catalogue except as otherwise specified herein, to be delivered on or about January 9, 1922". The said contract

veyed or until the full purchase price is paid in money. I agree to accept as my agent and employee any motor furnished by you for inspection in the operation of said motor car.

It is understood that there are no warranties or representations, express or implied, not specified herein, respecting the goods hereby ordered. This order is not binding upon you until accepted and signed by your Retail Manager.

Price of Motor car with Standard Equipment
\$1,100.00

\$1,100.00

Extra equipment at following prices

Gold 28.40
Type 28.00
Rear 28.00

Front and trailing expense

For the motor car and equipment as above specified, subject to your standard warranty and standard service policy as printed on the back of this order, I agree to pay the sum of \$1,128.40

In payments as follows:
By cash deposit accompanying this order
By one new Chevrolet Motor Car which I agree to deliver to you on or before
I will give you a sign of all items and accessories and in the same manner as at present, reasonable wear and tear except

\$88.00
\$28.40

Equipment

Balance to be paid to you upon delivery \$15.88

It is agreed that no change, alteration, modification or verbal agreement of any kind shall be effective to change, alter or amend the printed terms of this agreement, the Standard Warranty or the Standard Service Policy.

THOMAS M. CHEVROLET
SALESMAN

THOMAS M. CHEVROLET
SALESMAN

It will be observed that the motor car is not to be delivered until the full purchase price is paid in money. I agree to accept as my agent and employee any motor furnished by you for inspection in the operation of said motor car.

recites that, "If said motor car is not ready for delivery as specified, the cash deposit shall be returned to me by demand together with used car deposited in part payment, if any, or proceeds thereof, if sold, and you shall not be liable for damages for non-delivery.

It will also be observed that the price of the motor car with standard equipment F.O.B. Watseka was \$1580; that the cost of the extra equipment was \$68.10; that this constituted a total of \$1648.10 which the appellee agreed to pay for the motor car and equipment as specified. In view of the terms of this contract it appears to us that appellant sold and agreed to deliver to appellee an automobile with extra equipment. It was one transaction. It is not disputed but that appellee paid the full purchase price therefor.

There must have been some purpose for buying the extra equipment. The contract stated "with standard equipment except as otherwise specified therein". It was otherwise specified. It necessarily followed that the extra equipment would take the place of the standard equipment.

A reasonable construction of this contract is that the extra equipment was to be attached, and that the car under the terms of the contract should be tendered with the equipment attached, unless appellee waived such a delivery and that was one of the questions in the suit. Appellee contends that he did not waive such delivery and appellant that he did. We have examined the authorities submitted by appellant upon the question of this being a divisible contract, together with the sections of the Uniform Sales Act, and we are of the opinion that the contract in question is an entire contract and not a separable and divisible one. The testimony on the part of appellant indicates that he regarded his obligations under the contract to deliver the car with the extra equipment attached.

...that it was not necessary for delivery as specified, the same should be delivered to the ... for damages for non-delivery.

It will also be observed that the price of the motor car with standard equipment F.O.B. Watson was \$1580; that the cost of the extra equipment was \$68.10; that this constituted a total of \$1648.10 which the appellee agreed to pay for the motor car and equipment as specified. In view of the terms of this contract it appears to us that appellant sold and agreed to deliver to appellee an automobile with extra equipment. It was one transaction. It is not disputed but that appellee paid the full purchase price therefor.

There must have been some purpose for buying the extra equipment. The contract stated "with standard equipment except as otherwise specified herein". It was also specified. It necessarily followed that the extra equipment would take the place of the standard equipment.

A reasonable construction of this contract is that the extra equipment was to be attached, and that the car under the terms of the contract should be tendered with the equipment attached, unless appellee waived such a delivery and that was one of the questions in the suit. Appellee contends that he did not waive such delivery and appellant that he did.

We have examined the authorities submitted by appellant upon the question of this being a divisible contract, together with the sections of the Uniform Sales Act, and we are of the opinion that the contract in question is an entire contract and not a divisible and divisible one. The testimony on the part of appellant indicates that he regarded his obligations under the contract as being the car with the extra equipment.

Appellant insists that the contract should ~~have~~ not have been admitted in evidence; that there is a variance between the contract as alleged in the special counts and stated in the bill of particulars, and the said contract admitted in evidence. The record discloses that the contract offered was made a part of the bill of particulars filed in this cause; that it was also a part of the declaration and set out as the copy of the instrument on which suit was brought. A variance between the instrument offered in evidence and the one mentioned in the declaration is immaterial, where there is no variance between it and the copy attached to the declaration as part thereof. *Massachusetts Mutual Life Insurance Company vs. Kellog*, 82 Ill. 614-617.

Furthermore appellant submitted instructions declaring the rules of law applicable to the facts proven, regardless of the issues made by the pleadings and asked for a verdict in accordance therewith. That the facts proven were not within the allegations of the pleadings cannot be complained of by either party on appeal where each submitted instructions declaring the rules of law applicable to the facts proven, regardless of the issue made by the pleadings and asking a verdict in accordance therewith. *Illinois Steel Company vs. Novak*, 184 Ill. 501; *C. & A. R. R. Co vs Harrington*, 192 Ill. 9-27; *I.C.R.R. Co. vs Latimer*, 128 Ill. 163. There is no variance where the legal effect of the instrument sued on is pleaded. *Kagay vs. Trustees*, 68 Ill. 75. It is not always necessary to set out all of the provisions of an instrument declared upon to avoid an objection of a variance. *Strong, Admr. vs. Gunning*, 153 Ill. App. 182. Moreover, we are of the opinion that the contract was admissible under the common counts. The court did not err in admitting the contract in evidence.

It is insisted that the court erred in admitting evidence of the value of the Chevrolet car.

...that the contract should have been admitted in evidence; that there is a variance between the contract as alleged in the special counts and stated in the bill of particulars, and the said contract admitted in evidence. The record discloses that the contract offered was made a part of the bill of particulars filed in this cause; that it was also a part of the declaration and not out as the copy of the instrument on which suit was brought. A variance between the instrument offered in evidence and the one mentioned in the declaration is immaterial, where there is no variance between it and the copy attached to the declaration as part thereof. Massachusetts Mutual Life Insurance Company vs. Kelley, 88 Ill. 614-617.

...furthermore appellant submitted instructions declaring the rules of law applicable to the facts proven, regardless of the issues made by the pleadings and asked for a verdict in accordance therewith. That the facts proven were not within the allegations of the pleadings cannot be complained of by either party on appeal where each submitted instructions declaring the rules of law applicable to the facts proven, regardless of the issues made by the pleadings and asking a verdict in accordance therewith. Illinois Steel Company vs. ... 101 Ill. 611; C. & N. W. Ry. Co. vs. ... 102 Ill. 611; I.O.O.F. Co. vs. ... 103 Ill. 611. There is no variance where the legal effect of the instrument and on is pleaded. ... 104 Ill. 611. It is not always necessary to set out all of the provisions of an instrument declared upon to avoid an objection of a variance. Strong, ... 105 Ill. 611. App. 106. Moreover, we are of the opinion that the contract was admissible under the common law. The court did not err in admitting the contract in evidence.

The Chevrolet car was taken in at the price of \$1018.20 as part payment for the Studebaker car. This was a valuation placed on the Chevrolet car and was to be received in payment for that sum. On the trial of the case appellee proved it to be of the value of \$950.00. This evidence was evidently offered with a view of assisting the jury in determining the correct measure of damages if damages were to be allowed. It was \$68.20 less than appellant himself had valued it and being less than his own valuation did not work any harm to the appellant and if it was error, it was harmless error and not such that the appellant can take advantage of. Appellant insists that certain instructions given on the part of appellee are erroneous, especially in the second, third, fourth and fifth. The second instruction is as follows:

"The court instructs you that it is the law that where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until such a thing has been done, and if in this case you should believe from the evidence that the automobile in question was left with the defendant for the purpose of attaching a front and rear bumper, an extra cord casing, and an inner tube as agreed upon between the parties, then you are instructed that the title to the automobile in question did not pass until the automobile was put into a complete deliverable state, unless you further believe from the evidence that after the execution of the contract of sale, the automobile was delivered to and accepted by the plaintiff with the intention that he should become the owner of the same, without the then delivery of such bumpers, casing and inner tube, in which ~~the~~ case the plaintiff would be the owner of said automobile and the title thereto".

Appellant insists that the court in this instruction assumed that he and appellee had agreed that said extra cord

The Chevrolet car was taken in at the price of \$1018.20 as
part payment for the Studebaker car. This was a valuation
placed on the Chevrolet car and was to be received in payment
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was \$68.20 less than appellant himself had valued it and being
less than his own valuation did not work any harm to the appellant
and if it was error, it was harmless error and not such that
the appellant can take advantage of. Appellant insists that
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The second instruction is as follows:
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and rear bumper, an extra word casing, and an inner tube as
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the title to the automobile in question did not pass until the
automobile was put into a complete deliverable state, unless
you further believe from the evidence that after the execution
of the contract of sale, the automobile was delivered to and
accepted by the plaintiff with the intention that he should
become the owner of the same, without the then delivery of
such bumper, casing and inner tube, in which case the
plaintiff would be the owner of said automobile and the title

casing, inner tube and bumpers should be attached to said Studebaker motor car, before it should be considered ready for delivery. This instruction was given by reason of the construction that the court had put upon the contract. It is quite apparent that the court held that the contract in question was an entire one and not a separable and divisible one, and that the extra equipment was to be attached. This is the construction that we have placed upon the contract and we are of the opinion that the court did not err in the giving of the instruction.

All of the instructions given on the part of Appellee, were based on his theory of the case. In view of the construction given the contract, we are of the opinion that the court did not commit error in the instructions given for appellee.

We have examined the instructions that were permitted to go to the jury on the part of appellant, as well as those that were offered and refused. It appears that the instructions given as a whole fairly state the law of the case. The testimony is conflicting: Appellee and appellant presented their respective theories to the jury: It was the special province of the jury to settle all the questions of fact. The court has no right to interfere with the verdict of the jury unless it is manifestly against the weight of the testimony. Under the evidence as disclosed in this record, we cannot say that the verdict is manifestly against the weight of the evidence. We, conclude, therefor that the judgment of the circuit court of Irquois County should be affirmed.

Judgment Affirmed.

... and it is not to be considered ready for
 delivery. This instruction was given by reason of the contract-
 that the court had put upon the contract. It is quite
 apparent that the court held that the contract in question was
 an entire one and not a-separable and divisible one, and that
 the extra equipment was to be attached. This is the contract-
 that we have placed upon the contract and we are of the
 opinion that the court did not err in giving of the instruction.
 All of the instructions given on the part of Appellee,
 were based on his theory of the case. In view of the contract-
 that the court gave the contract, we are of the opinion that the court
 did not commit error in the instructions given for Appellee.
 We have examined the instructions that were permitted
 to go to the jury on the part of appellant, as well as those
 that were offered and refused. It appears that the instructions
 given as a whole fairly state the law of the case. The
 testimony is conflicting. Appellee and appellant presented their
 respective theories to the jury. It was the special province
 of the jury to settle all the questions of fact. The court has
 no right to interfere with the verdict of the jury unless it
 is manifestly against the weight of the testimony. Under
 the evidence as disclosed in this record, we cannot say that
 the verdict is manifestly against the weight of the evidence.
 We, therefore, sustain the judgment of the circuit court
 of this case and we affirm.

Respectfully,
 J. M. ...

STATE OF ILLINOIS, {
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

Appellate Court,
and Seal thereof.
Court in

I herewith set my hand and affix the seal of
the year of our Lord one thousand
day of

7450

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

7450.
7540

Agenda 67.

Frank B. Holland,
Appellee,

vs
Appeal from
County Court
Bird-Sykes Company, a corporation,
Appellant.

Jett, P.J.

Peoria, County
238 I.A. 638

This suit was instituted by Frank B. Holland, appellee, in the County Court of Peoria County, upon a notice to the sheriff and the filing of a petition claiming certain property levied upon by the sheriff, by virtue of an execution issued out of the office of the Clerk of the Circuit Court of said Peoria County, on a judgment obtained in favor of Bird-Sykes company, a corporation, against the Kickapoo Creek Coal Company, a corporation.

A trial was had before the Court without the intervention of a jury. The Court found in favor of appellee. An appeal is prosecuted to this court.

Bird-Sykes Company, referred to as appellant throughout the argument, assigns a number of reasons for a reversal of the judgment of the County Court. The principal contention of appellant is that the foreclosure was invalid because no outward change of possession, no possession in fact, took place between the time of the execution of the alleged chattel mortgage until the levy of the sheriff and for that reason was a fraud upon appellant. It is also insisted that the mortgage was invalid; that the Court erred in the admissibility of testimony and that the judgment is contrary to the law and the evidence.

On November 3, 1922, Bird-Sykes Company, appellant, brought suit in the Circuit Court of Peoria County against the Kickapoo Creek Coal Company to recover the balance due on a

7420
1923

Frank B. Holland,
Appellee.

Appeal from

County Court

Peoria, County

Bird-Sykes Company, a corporation,
Appellant.

338 I.A. 638

Test, P. 1.

This suit was instituted by Frank B. Holland, appellee, in the County Court of Peoria County, upon a notice to the sheriff and the filing of a petition claiming certain property levied upon by the sheriff, by virtue of an execution issued out of the office of the Clerk of the Circuit Court of said Peoria County, on a judgment obtained in favor of Bird-Sykes Company, a corporation, against the Chicago Greek Coal Company, a corporation.

A trial was had before the Court without the intervention of a jury. The Court found in favor of appellee. An appeal is presented to this court.

Bird-Sykes Company, referred to as appellant throughout

the argument, assigns a number of reasons for a reversal of the judgment of the County Court. The principal contention of appellant is that the foreclosure was invalid because no actual change of possession, no possession in fact, took place between the time of the execution of the alleged chattel mortgage until the levy of the sheriff and the fact known was a fact upon appeal. It is also insisted that the mortgage was invalid; that the Court erred in the admission of testimony and that the judgment is contrary to the law and the evidence.

On November 5, 1922, Bird-Sykes Company, appellant, brought

2.

Paige truck. On January 9, 1924, a judgment was rendered in favor of appellant and against the Coal Company for the sum of \$2280.36. On January 12, 1922, an execution was issued on the said judgment.

The record disclosed that on November 7, 1922, four days after the institution of the suit by appellant against the Coal Company an alleged meeting of the directors of the Coal Company was ^{had} held at which time a resolution was adopted authorizing John Raynor, the President, to mortgage all of the assets of the Coal Company to appellee for \$5000.00 on the condition that he was to advance money to meet his payroll and other expenses as required weekly.

On November 15, 1922, the mortgage was executed and recited that it was given to secure a note of even date for the sum of \$5000, with interest at the rate of 6% per annum due in six months, but the note itself appears to have been executed on November 6, 1922 by the Kickapoo Creek Coal Company by John Raynor, President. The said mortgage was filed for record November 25, 1922.

When the note became due it was not paid and appellee claims he took possession of the property described in the mortgage and posted notices to that effect and left the same in the custody of John Raynor the President of the Coal Company; that he afterwards had a sale and bought the trucks and subsequently sold them to Raynor and that Raynor used the trucks in his own private business.

The minutes of the meeting of the directors of the coal Company held on November 7, 1922, four days after the institution of the suit by appellant against the coal company at which time it is claimed the president was authorized to execute the mortgage to appellee, do not show who was present but do show that the mortgage was to secure advances to be made to meet the pay roll and other expenses

On January 7, 1932, a statement was received from the appellant and signed by the appellant for the purpose of the same. On January 12, 1932, an affidavit was sworn to by the appellant.

The record disclosed that on November 7, 1932, the appellant filed a petition for the appointment of a receiver of the assets of the Coal Company to appraise for \$5000.00. The record further disclosed that on November 7, 1932, the appellant filed a petition for the appointment of a receiver of the assets of the Coal Company to appraise for \$5000.00. The record further disclosed that on November 7, 1932, the appellant filed a petition for the appointment of a receiver of the assets of the Coal Company to appraise for \$5000.00.

On November 12, 1932, the mortgage was executed and recorded. It was given to secure a note of even date for the sum of \$5000.00, with interest at the rate of 6% per annum. The note itself appears to have been executed on November 6, 1932 by the Kickapoo Creek Coal Company by John Raynor, President. The said mortgage was filed for record November 25, 1932.

When the note became due it was not paid and appellee thereupon took possession of the property described in the mortgage and posted notice to that effect and left the same in the custody of John Raynor the President of the Coal Company. It is claimed that the appellant sold them to Raynor and that Raynor used the same in his own private business.

The minutes of the meeting of the directors of the coal company held on November 7, 1932, four days after the institution of the suit by appellant against the coal company at which time it is claimed the president was authorized to execute the mortgage to appellee, do not show that the mortgage was in fact executed.

3.
in connection with the business of the company. There is no evidence of advances having been made to meet the payroll. If payments had been made there would have been no difficulty on the part of appellee and Raynor proving such payments; they each testified in the case concerning the transactions but their testimony was confined almost exclusively to the acts of appellee in taking possession of the trucks after the mortgage became due. According to Raynor's testimony all of the property that belonged to the Kickapoo Creek Coal Company was covered by this chattel mortgage.

Nothing is shown by the record that any stockholder of the Coal Company had or could be charged with having any knowledge of this mortgage. The minutes of the meeting do not show that there was a quorum present of the directors; they do not show how many voted for the execution of the chattel mortgage. The only person so far as the record discloses that was present, was John Raynor, President. The record does not disclose that the secretary was either present or absent. The chattel mortgage seems to have been signed, "Kickapoo Creek Coal Company, by John Raynor"; it does not show that he executed the mortgage as President of the company.

On the hearing the appellee among other things testified as follows: "The trucks were in Mr. Raynor's possession during the time of this running of notice of foreclosure. By Mr. Raynor's possession I mean in the possession of the Kickapoo Creek Coal Company. The Kickapoo Creek Coal Company still had possession up until the time of the sale. From the maturity of the note to the time of the sale the trucks were used by the Kickapoo Creek Coal Company. After the sale the trucks were left in the garage where they were before. Really, I don't know whether they were moved or not up to the present time.

in connection with the business of the company. There is
no evidence of any other business being done by the
company. It appears that the company was organized for the
purpose of operating the property and the business of the
company. On the part of appellee and Raynor proving
that each testified in the case concerning
the business and their testimony was confirmed almost
entirely by the acts of appellee in taking possession
of the property after the mortgage became due. According
to Raynor's testimony all of the property that belonged to
the Kishwaukee Creek Coal Company was covered by this chattel
mortgage.

Nothing is shown by the record that any stockholder of
the coal company had or could be charged with having any
knowledge of this mortgage. The names of the stockholders are
shown that there was a person present at the directors; they
do not show how many voted for the execution of the chattel
mortgage. The only person who is shown to have been present
at the meeting was John Raynor, president. The names of the
stockholders are shown that the mortgage was signed by
Raynor, president of the company, by John Raynor, president of the
company, and by John Raynor, president of the company.

On the hearing the appellee offered other things testified
to by him. The facts were as follows: The mortgage was
executed on the 1st day of June, 1900, at Chicago, Illinois.
At that time I was in the possession of the
Kishwaukee Creek Coal Company. The Kishwaukee Creek Coal
Company will not be liable for the mortgage until the coal
is sold. The mortgage was made by the Kishwaukee Creek Coal
Company and the mortgage was made by the Kishwaukee Creek Coal
Company.

4.

After the sale the trucks were located at 340 Knoxville avenue; 340 Knoxville avenue was occupied by the John Raynor Coal Company after it was formed. Prior to the sale it was the Kickapoo Creek Coal Company, and they occupied it up to the time of the sale. So far as I know, the Kickapoo Creek Coal Company did not move out at that time, and so far as I know they continued in possession at that time. The trucks are now occupying the same place in the same building; so far as I know these trucks occupied the same garage they did at the time the mortgage was given. It is under the supervision of John Raynor. These trucks are at his place of business. I could not say the trucks were in the same garage at the time they gave the mortgage. I would say that they were in the possession of John Raynor. John Raynor was the president of the Kickapoo Creek Coal Company at the time the mortgage was given. I understand that the trucks I refer to are the same trucks that were levied upon by the Sheriff in this case. John Raynor is the Raynor Coal Company. I would not say that he is the sole proprietor of it, until he gets it paid for. I should say I am interested in it. I am not a partner.

Raynor among other things testified as follows:

I was president of the Kickapoo Creek Coal Company at the time these notes were given. The Kickapoo Creek Coal Company was a corporation. John Raynor was president of the Kickapoo Creek Coal Company at the time of the foreclosure sale; John Raynor is myself. I was president of the Kickapoo Creek Coal Company at the time I was custodian of the trucks. The trucks were in the same building when the mortgage was foreclosed and continued to be there until after the sale. They are not in the same building now; they are now at 340 Knoxville avenue; they were in 320 Knoxville before. I still have control of them; I had the working control of them after the sale. I had the direct custody and charge of these trucks at the time the mortgage was given to Holland.

After the sale the premises were located at 345 Knoxville Avenue;

and Knoxville Avenue was located at 345 Knoxville Avenue;

and after it was located, prior to the sale it was the

property of the same owner, and it was located at 345

the same place, and it was located at 345

and it was located at 345, and so far as I know

they continued in possession at that time. The trucks are now

located in the same place in the same building; so far as I

know, the trucks occupied the same garage they did at the time

the mortgage was given. It is under the supervision of John

Raynor. These trucks are at his place of business. I could

not say the trucks were in the same garage at the time they

were in the mortgage. I would say that they were in the possession

of John Raynor. John Raynor was the owner of the

Knoxport Green Coal Company at the time the mortgage was given.

I understand that the trucks I saw in the same place

that were levied upon by the Sheriff in this case. John Raynor

is the owner of the Knoxport Green Coal Company. I would not say that he is the

sole proprietor of it, until he gets it paid for. I should

say I am interested in it. I am not a partner.

Raynor among other things testified as follows:

I was president of the Knoxport Green Coal Company at

the time these notes were given. The Knoxport Green Coal

Company was a corporation. John Raynor was president of the

Knoxport Green Coal Company at the time of the foreclosure sale;

John Raynor is myself. I was president of the Knoxport Green

Coal Company at the time I was creation of the trucks.

The trucks were in the same building when the mortgage was

foreclosed and continued to be there until after the sale.

They were in the same building until they were sold at the

Knoxville Avenue; they were in 345 Knoxville before. I

5.

When the mortgage was foreclosed I didn't have anything more to do until after the sale. I was appointed custodian. I had a working agreement after the sale to take the trucks out and I still have the agreement. I still have custody of these trucks, or did have up until the time of the Sheriff's levy, except only the ten days of the foreclosure. Since then I have had the power to go ahead and use them and did use them up to the time of the levy. There isn't any Kickapoo Creek Coal Company; it was allowed to die the day the sale was made. All of the assets of the Kickapoo Creek Coal Company went to Holland, who owned the mortgage. This mortgage ^{that} was given to Holland covered all the assets of the Kickapoo Creek Coal Company. These trucks I speak of are the same trucks that were mortgaged to Holland and are the same trucks that I had in my possession until the time of the levy by the Sheriff and the same ones levied on by the Sheriff. John Raynor and Frank Holland are the Raynor Coal Company. Frank Holland is not a partner of mine. Frank Holland owns the John Raynor Coal Company. I have a working interest in it."

Holland and Raynor speak of a sale. There is no proof of any sale under the mortgage by appellee, yet appellee claims to have sold the property to Raynor. After the mortgage became due there was no apparent change in the possession of the property although appellee and Raynor testified that the appellee took possession and was put in charge as custodian. The mortgage itself was defectively acknowledged. This defect of course, would not be fatal if it was the only ground of complaint but it is a circumstance proper to be taken into ~~examined~~ consideration, especially so, when considered in connection with the facts as are disclosed relative to the authority to execute the mortgage.

The evidence shows that Raynor, president of the Coal

When the mortgage was foreclosed I didn't have anything more to do until after the sale. I was a little confused. I had a writing agreement after the sale to take the trucks out and I still have the agreement. I still have custody of these trucks, or did have up until the time of the Sheriff's levy, except only the ten days of the foreclosure. Since then I have had the power to go ahead and use them and did run them up to the time of the levy. There isn't any Kikapoo Creek Coal Company; it was allowed to die the day the sale was made. All of the assets of the Kikapoo Creek Coal Company went to Holland, who owned the mortgage. This mortgage was given to Holland, covered all the assets of the Kikapoo Creek Coal Company. These trucks I speak of are the same trucks that were mortgaged to Holland and are the same trucks that I had in my possession until the time of the levy by the Sheriff and the same ones levied on by the Sheriff. John Hayner and Frank Holland are the Hayner Coal Company. Frank Holland is not a partner of mine. Frank Holland owns the John Hayner Coal Company. I have a working interest in it."

Holland and Hayner speak of a sale. There is no proof of any sale under the mortgage by affidavit, and neither claim to have sold the property to Hayner. After the mortgage became due there was no payment made in the payment of the property although affidavits and Hayner testified that the affidavits took possession and was not in Hayner's possession. The mortgage itself was defectively acknowledged. This defect of course, would not be fatal if it was the only ground of complaint but it is a circumstance proper to be taken into account in connection with the facts as are disclosed relative to the authority to execute the mortgage.

6.

Company, was in possession of the property during the lifetime of the mortgage, and he was custodian after the default was made in the payment and during the alleged foreclosure proceeding. The property remained at the same place during the interval pending the time of the alleged sale. The evidence also shows that Raynor assisted in posting the notices of sale. Appellee offered a bill of sale with a view of showing that he had sold the property in question to Raynor. The bill of sale purports to have conveyed the same identical property ~~that~~ ~~property~~ that was described in the mortgage and the consideration is \$5000, and it recites that the vendee, Raynor, was to pay the purchase price as follows: the sum of \$200 upon the execution of the contract and the sum of \$400, each and every month thereafter until the whole sum together with 7% interest was paid. There is no evidence in this record that Raynor ever paid a dollar on this contract. If this was in fact a sale, appellee, and if any money had been paid, could easily have established that fact.

In view of the fact that the evidence established that within four days after the bringing of the suit by appellant against the coal company, the mortgage was executed covering all of the property that was owned at that time by the Kickapoo Creek Coal Company; that the note the mortgage purports to secure, shows upon its face that it was executed prior to the time of the meeting of the Board of Directors to authorize the mortgage; that the evidence fails to show appellee advanced or paid any money when the note and mortgage were executed, to meet the pay roll or for any other purpose; that Raynor, as president of the company, had the custody and possession of the property in question during the lifetime of the mortgage, and when it was sought to foreclose the same, he was put in charge as custodian, and the property was kept at

Company, was in possession of the property during the lifetime of the testator, and he was entitled after the death of the testator to the property and during the alleged foreclosure proceedings. The property was sold at the same place during the sale. The evidence is that the time of the alleged sale. The evidence also shows that the property was sold in paying the notes of sale. The evidence offered a bill of sale with a view of showing that the bill of sale was in question to Rayner. The bill of sale purports to have conveyed the same identical property that was described in the mortgage and the commission is \$100, and it recites that the vendor, Rayner, was to pay the purchase price as follows: the sum of \$200 upon the execution of the contract and the sum of \$400, each and every month thereafter until the whole sum together with 7% interest was paid. There is no evidence in this record that Rayner ever paid a dollar on this contract. If this was in fact a sale, and if any money had been paid, could easily have established that fact.

In view of the fact that the evidence established that the bill of sale was after the bringing of the suit by Rayner against the coal company, the mortgage was executed covering all of the property that was owned at that time by the defendant Coal Company; that the note the mortgage purports to secure, shows upon its face that it was executed prior to the time of the meeting of the Board of Directors to authorize the mortgage; that the evidence fails to show appellee advanced or lent any money when the note and mortgage were executed, it must be held that the note and mortgage were executed, as provided in the company, had the company and the mortgage, and when it was sought to foreclose the same, he

7.

the same place during the pendency of the foreclosure proceedings; that the evidence fails to show any fact or facts relative to a sale by virtue of the mortgage; that Raynor participated in posting the notices of foreclosure; that there is no evidence in the record showing Raynor who claims to have purchased the property from appellee, and is now doing business as John Raynor Coal Company, and using the trucks, ever paid a dollar for them; that appellee testified John Raynor was the owner of the John Raynor Coal Company that he had a working interest in it, but was not a partner; that John Raynor testified appellee owns the John Raynor Coal Company, and that he had a working interest in it. We are of the opinion that the mortgage was merely a make-shift to get the title of the property, out of the coal company so as to prevent the collection of the judgment on which the execution was issued. The juggling was such it appears that neither appellee nor Raynor knew, as is indicated by their testimony, who was in fact the owner of the Raynor Coal Company which included the property in question.

We therefore conclude, that the judgment of the County Court should be reversed and the cause remanded, which is accordingly done.

REVERSED AND REMANDED.

was the possession of the property during the lifetime

the same place during the pendency of the foreclosure proceedings; that the evidence fails to show any fact or facts relative to a sale by virtue of the mortgage; that Raynor was not interested in testing the notices of foreclosure; that

there is no evidence in the record showing Raynor who claims

to have purchased the property from appellee, and is now doing business as John Raynor Coal Company, and using the

name, ever paid a dollar for them; that appellee testified

that Raynor was the owner of the John Raynor Coal Company

that he had a working interest in it, but was not a partner;

that John Raynor testified appellee owns the John Raynor

Coal Company, and that he had a working interest in it.

We are of the opinion that the mortgage was merely a

device to get the title of the property, out of the coal

company so as to prevent the collection of the judgment on

which the execution was issued. The finding was such it

appears that neither appellee nor Raynor knew, as is

indicated by their testimony, who was in fact the owner of

the Raynor Coal Company which included the property in

question.

We therefore conclude, that the judgment of the County

Court should be reversed and the cause remanded, which is

so ordered.

AND REMANDED.

It is so ordered.

Done at the City of St. Louis, Missouri, this 10th day of

January, 1906.

Attest: My hand and seal of the Court, this 10th day of

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

the year of our Lord and thousand
four hundred and thirty

*Final opinion filed April 10, 1924.
Rehearing granted Oct 15, 1924.*

212

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

233 I.A. 238²

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AUGUST

JUSTUS JOHNSON,
WRITER, SPEER

of 20

Maude M. Ely, Administratrix of
the Estate of William R. Ely, de-
ceased, Appellee,

v.

Appeal from Cir-
cuit Court of
Grundy County

Prudential Insurance Company of
America, a corporation, Appellant

Jones P.J.

238 I.A. 638

The plaintiff Maude M. Ely, administratrix of the estate of William R. Ely, deceased, who is appellee here, brought this suit in assumpsit in the circuit court of Grundy County, against the defendant, the Prudential Insurance Company of America, appellant here, for the sum of \$50,000, based upon a ten year term insurance policy for \$25,000, issued by the defendant upon the life of William R. Ely, of Gibson City, Illinois. The policy bore date September 30th, 1912, and was delivered on October 27th, 1912. The insured, Dr. William R. Ely, disappeared in the city of Chicago on October 29th, 1912, two days after the delivery of the policy of insurance.

The plaintiff's declaration consisted of two special counts and the common counts. The first special count, alleged the execution and delivery of the policy for \$25,000 on the life of the insured on October 27th, 1912, and charged the death of the insured at Chicago on October 29th, 1912, while the policy was in force. It further averred an offer by the plaintiff to make proof of death, which was declined by defendant. The second special count alleged the execution and delivery of the policy, the disappearance of the insured on October 29th, 1912, the making of a search for him, that he had not been heard from since October 29th, 1912 and that he died on October 30th, 1912. This count also averred that the plaintiff offered proof of death of the insured, that the

Wanda M. Ely, Administratrix of
the Estate of William R. Ely, de-
ceased, Appellee,

Appeal from Cir-
cuit Court of
Grundy County

v.

Prudential Insurance Company of
America, a corporation, Appellant

Jones P. J.

2381 A. 638

The plaintiff Wanda M. Ely, administratrix of the
estate of William R. Ely, deceased, who is appellee here,
brought this suit in assumpsit in the circuit court of Grundy
County, against the defendant, the Prudential Insurance Com-
pany of America, appellant here, for the sum of \$50,000,
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of Gibson City, Illinois. The policy bore date September
30th, 1912, and was delivered on October 27th, 1912. The
insured, Dr. William R. Ely, disappeared in the city of
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2.
defendant refused to accept the same and denied liability, that the plaintiff complied with all the provisions of the policy and tendered the second annual premium before the policy lapsed, and that the appellant refused to accept said premium or any further premiums. At the close of the evidence, the plaintiff dismissed as to the common counts.

The defendant pleaded the general issue and two special pleas. Both special pleas denied the death of the insured while the policy was in force and alleged that the second premium had not been paid at the time it was due, on September 30th, 1913, or within the thirty days' period of grace thereafter, so that the policy lapsed.

The plaintiff took leave to reply double to the special pleas and by such replications averred in substance that the insured died during the life of the policy; that plaintiff tendered the second annual premium when the same became due and within the period of grace therefor; that the defendant, by its agent, refused to accept the tender or to accept any further premiums upon the policy; that the defendant, through its agent, stated to the plaintiff that the defendant would either produce William R. Elt alive within seven years from October 29th, 1912 or at the expiration of seven years would pay the amount of the policy, and that plaintiff need pay no further premiums. Rejoinders were filed to the replications, and the case was tried before a jury, which rendered a verdict for \$37,390.41. After denying the motion for a new trial and in arrest of judgment, the court rendered judgment on the verdict from which the defendant appealed.

After considering the case for some time, the jury sent word to the court that they desired further instruction. The court caused the jury to be brought in and learned from its foreman that they wished to know whether they would be

defendant refused to accept the same and denied liability, that the plaintiff complied with all the provisions of the policy and tendered the second annual premium before the policy lapsed, and that the appellant refused to accept said premium or any further premiums. At the close of the evidence, the plaintiff dismissed

the case to the common pleas. The defendant pleaded the general issue and two special pleas. Both special pleas denied the death of the insured while the policy was in force and alleged that the second premium had not been paid at the time it was due, on September 30th, 1912, or within the thirty days' period of grace thereafter, so that the policy lapsed.

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The jury rendered a verdict for \$37,390.41. After denying the motion for a new trial and in arrest of judgment, the court rendered judgment on the verdict from which the defendant appealed. After considering the case for some time, the jury went back to the court that they desired further instruction. The court caused the jury to be brought in and learned from its foreman that they wished to know whether they would be

other 30th, 1912. This court also rendered judgment on the verdict of death of the

allowed to include interest on their verdict. The court sent the jury back to its room and had appellee's counsel prepare a further instruction. When this was done, the court again called the jury in and instructed it to add interest at the rate of five per cent per annum, if liability existed. This instruction was marked Number 11. The defendant excepted to the giving of it. The jury, by their verdict, found against the plaintiff in the sum of \$25,000 principal and the further sum of \$12590.41 for interest. The court thereupon gave them written instruction Number 12 to find the amount in a lump sum, including principal and interest, if the jury found that interest was due. Defendant excepted to the giving of this instruction. The jury again retired. They later returned a verdict assessing plaintiff's damages in the sum of \$37,390.41. The allowance of \$12,590.41 as interest makes it clear that the jury reached the conclusion that the death of the insured occurred on the 29th day of October 1912, as alleged in the first count of the declaration.

The principal grounds urged for the reversal of the cause are that the evidence is insufficient to support the verdict, under either count of the declaration; that the court erred in the admission of certain evidence on behalf of the plaintiff and the exclusion of certain evidence offered on behalf of the defendant; that certain instructions were erroneous and that the verdict was excessive.

The rule concerning the presumption of death is fully stated in the case of *Kennedy vs. Modern Woodmen* 243 Ill. 560, as follows:- "The law is well settled in this State that where a person leaves home with the expectation of returning thereto within a short time, and he remains away, and his absence is unexplained and unaccounted for and no intelligence is received from him and he is not heard from, and his whereabouts cannot be ascertained, although diligent search and inquiry are

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instruction. The jury again retired. They later returned a
verdict assessing plaintiff's damages in the sum of \$27,800.41.
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made in the vicinity of his home and at such places as he would be likely to be and from such persons as he would be likely to meet and know, and nothing is heard from or of him, and he remains away from his family and home for a period of seven years, a presumption arises from these facts that he is dead, unless there are other facts and circumstances shown, which will rebut and overcome such presumption of death."

There is no presumption that such person died at the time of disappearance or at any particular time during the period of seven years, in the absence of evidence sufficient to raise a presumption of death at some particular time before the expiration of the seven years. In the case of *Donovan v. Major* 253 Ill. 179, Will C. Wright disappeared on April 15th, 1893. The court said, after stating the rule announced in *Whiting v. Nicoll* 46 Ill. 230:- "The conclusion to be drawn from the record is that Will C. Wright is to be regarded as dead on the 15th day of April 1900 and not before, unless evidence of facts and circumstances appear sufficient to justify the inference that he died at an earlier date." The court further said:- "The presumption of fact which will justify the conclusion of death before the lapse of time required for the legal presumption must arise from evidence of circumstances, tending to show death. That the absentee was exposed to some specific peril; that he sailed in a vessel which had never been heard from though many months overdue; that he was last seen as a passenger on an ocean steamer in mid-ocean, at night, and was never seen or heard of afterward, though diligent search was made next morning; that he made threats to commit suicide prior to his disappearance; that the condition of his health was desperate; that he was afflicted with some disease likely to undermine his constitution--these are the circumstances which may be considered as tending to raise a just inference of death. The

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was exposed to some specific peril; that he sailed in a
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overboard; that he was last seen as a passenger on an ocean
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of afterwards, though diligent search was made next morning;
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The health, age, habits, disposition, manner of life, pecuniary circumstances and family relations of a person, who has disappeared are all proper for consideration in determining whether he probably died before the expiration of seven years."

The presumption of death at the end of seven years following the disappearance of the absentee without his having been heard from by those who would have been most likely to hear of him and in the places in which he would be most likely to be found, is not a conclusive presumption, but may be rebutted by the showing of such facts and circumstances as would justify the conclusion that the absentee continued to live after the expiration of seven years. It is said, "On the other hand if his relations with his family were strained, if he was in straightened circumstances, unhappy and discontented with his surroundings and associations, the likelihood of his return or communication would naturally be much lessened." (Reedy v. Millizen 155 Ill. 646.) Numerous cases might be cited in support of the propositions laid down above and they will be found collected in the cases cited.

The evidence offered by the plaintiff to raise a presumption of the death of Dr. Ely on October 29th, 1912, tends to show that at the time of his disappearance he was a young man of 33 years in perfect health, having a wife and four children. Plaintiff's evidence also tends to show that his family relations were friendly; that his practice was good; that he was a member of the Presbyterian Church holding the office of deacon; that he taught a Sunday School class; that he had no immediate financial worries; that in company with his wife, he went to Chicago on the 29th day of October 1912; that after shopping with her for some time he left her and went to see his sister who resided there intending to meet his wife for dinner that evening at the home of Richard Morris, and to accompany the Morrises to the theater; that he

in the vicinity of his home and in the vicinity of his business. The health, age, habits, disposition, manner of life, pecuniary circumstances and family relations of a person, who has disappeared, are all proper for consideration in determining

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(Ready v. Millison 155 Ill. 526.) Numerous cases might be

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The evidence offered by the plaintiff to raise a pre-

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a young man of 33 years in perfect health, having a wife and

two children. Plaintiff's evidence also tends to show

that his family relations were friendly; that his practice was

good; that he was a member of the Presbyterian Church holding

the office of deacon; that he taught a Sunday School class;

that he had no immediate financial worries; that in company

with his wife, he went to Chicago on the 23rd day of October

1912; that after shopping with her for some time he left her

did visit his sister and upon leaving stated to his nephew that he was going to the home of Richard Morris and inquired the best route to take; that his nephew told him to take a street car, by way of the 12th street viaduct; that this viaduct extends over the Chicago River and numerous railroad tracks for a mile through a district having no residences and said to be a dangerous locality infested with bad men; that about six o'clock he called by telephone at the home of Richard Morris and told his wife that he was detained on the 12th street viaduct and would be out as soon as he could get there; that he did not appear and a search was made for him that night, the following morning and for days and weeks thereafter; and that a cap, believed to be his, with a three cornered hole cut through it and stained with blood, was found near the Chicago River beneath the 18th street viaduct.

To rebut the presumption of death, the defendant offered to show that Dr. Ely had had difficulty with his wife over Helen Langdon, a nurse in his employ; that he had confessed having had intimate relations with her; that he had traveled with her at different times, registering at hotels with her as his wife under assumed names; that he had performed a criminal operation upon one Lily Hansen; that a suit for malpractice was pending against him; that another such suit was in contemplation; that his home was heavily mortgaged and that foreclosure proceedings were pending; that he was very greatly in debt and had at different times, expressed an intention to leave the country. It was also shown that, at the hour of six o'clock in the evening, the 12th street viaduct was generally crowded with many teams, wagons and foot passengers and that if anyone had been killed at that place, at that time of the day, there would very likely have been numerous eye witnesses, who could have been found. It is also shown that

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To rebut the presumption of death, the defendant offered

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illicit sister and upon leaving stated to his nephew

7.

dredging the river and dynamiting it failed to bring his body to light.

There is in plaintiff's evidence but little to raise a suspicion of the doctor's death at the time of his disappearance. There is much in evidence to rebut any inference that he died on October 29th, 1912.

Appellee insists that the evidence offered to raise a presumption of death before the end of seven years from the disappearance of Dr. Ely is aided by the presumption of death arising from seven years' absence and cites Conner v. New York Life Insurance Co. 166 N.Y. Supp. 185. In that case all of the absentee's clothes were found in a bathhouse and his ring and pin were found in the office. The case recognizes the rule contended for by the appellee above stated, that if the absentee were in some specific peril, at the time of his disappearance, death might be inferred at that time. However, there was sufficient evidence there to warrant such an inference, but in this case, the evidence on that point is wholly insufficient to raise an inference of fact that the absentee died on October 12th, 1912. Therefore, the jury should not have allowed interest from that day.

Upon the trial the defendant offered to prove by Etta Wood that Dr. Ely performed an operation upon George Wood, the character of the operation, and its result. The court declined to admit this evidence, but permitted the defendant to prove that Wood had filed a suit against the estate of Dr. Ely charging malpractice. The defendant also offered to prove malpractice in the treatment of a Mrs. Smith by showing the ailment and the character of treatment. This, the court denied but did permit the defendant to prove that Mrs. Smith had filed a suit for malpractice against Dr. Ely early in 1912 and that it was still pending at the time he disappeared. We

...the river and ...
...to light.
...
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all of the absentee's clothes were found in a bathroom and
his ring and pin were found in the office. The same presumption
the rule contended for by the appellee above stated, that if
the absentee were in some specific peril, as the case of his
disappearance, death might be inferred at that time. However,
there was sufficient evidence there to warrant such an infer-
ence, but in this case, the evidence on that point is clearly
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to prove that Wood had killed a man against the state of ...
Dr. Kiy's expert witnesses. The defendant also offered to
prove negligence in the treatment of a Mrs. ... of ...
the illness and the character of treatment. This, the court
refused to admit and the defendant to prove that ...
had killed a man for negligence against Dr. Kiy ... in 1912

see no error in the rulings of the court in these two instances. If the defendant had been permitted to show the character of the operation for the purpose of showing malpractice, the plaintiff would be entitled to offer evidence in rebuttal. That would involve the trial of another case foreign to the issues.

The defendant also offered to show that Mrs. Ely had said shortly after her husband's disappearance, that if Helen Langdon, the above mentioned nurse, could be found, there Dr. Ely would be found too. It further offered to prove that Dr. Ely had introduced Helen Langdon to one of the witnesses and had said that he was in love with her; that his home life ~~was~~ was unhappy on her account; that he was tired of it all and thought of leaving; that he admitted he had performed an illegal operation on Lily Hansen; that he admitted to another witness he had traveled with Helen Langdon, introducing her as his wife; and that he had kept her in his home for a week during the absence of Mrs. Ely. This evidence was competent and ought to have been admitted. Certainly Ely's admissions of his clandestine and licentious conduct is indicative of his disposition and character. They were matters in issue and were therefore competent to be shown. The alleged statement of his wife to the effect that if you will find the nurse you will find my husband, was but an expression of her opinion and becomes material and competent proof only because it tends to show Mrs. Ely's frame of mind and to reveal the existence of domestic disturbance growing out of her husband's alleged evil conduct; and moreover it tends to explain his absence and rebut the presumption of death.

Appellant offered to show by the witness Ralph Lott that he met Dr. Ely at the Planter's Hotel in Chicago sometime in February or March of 1915 and there had a conversation with Dr. Ely, in which the latter was addressed by name by the Witness, and returned the greeting;

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The defendant also offered to show that Mrs. Ely had said
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Langdon, the above mentioned nurse, could be found, there Dr.
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had said that he was in love with her; that his home life was
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wanted to leave; that he admitted he had performed an il-
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as his wife; and that he had kept her in his home for a year
during the absence of Mrs. Ely. This evidence was competent
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to show Mrs. Ely's frame of mind and to reveal the existence
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willful desertion, and moreover it tends to explain his absence and
what the presumption of law.

Plaintiff offered to show by the witness Ralph Lott that
he met Dr. Ely at the Plaster's Hotel in Chicago sometime

that Dr. Ely was asked by the witness what he was doing in Chicago and replied that he was just passing through; that the witness asked him how things were in Gibson City, to which Ely replied that he was no longer in Gibson City, and then turned abruptly away, left the witness, and entered the elevator. The court refused to admit this evidence and we think the ruling was erroneous. The fact that the witness and Ely were acquainted with each other and greetings were extended and acknowledged between them on the date of their alleged meeting is a circumstance which tends to strengthen the witness's claim of identification and to remove the possibility of a mistake. The alleged admission of Ely that he was not living in Gibson City, his failure to tell the witness where he was residing and his hasty and uncereemonious departure, were circumstances tending to show that his absence from home and his omission to make known his whereabouts to those who were entitled to receive such knowledge, was by intention and design. The offered testimony of this witness, if true, was of the utmost importance to appellant, and, if relied upon by a jury, constitutes a complete defense in this case. Appellant was not permitted to make certain other proof, which ought to have been admitted for the reasons we have given here. To specifically set forth each instance would extend this opinion without advantage. Our views can be readily understood and what we have herein said will be a sufficient guide in another trial. We are of the opinion that the declarations of Dr. Ely and indeed, every circumstance tending to show his character, habits, family relationship, and financial condition are admissable. (Reedy v. Millizen, supra.)

Complainant is also made that the witness Roy McNamara was permitted to testify to his conversation with the insured at the time he left the McNamara home the afternoon of October 29th., and to state that after he directed the doctor to the

that Dr. Ely was asked by the witness what he was doing in Chicago and replied that he was just passing through; that the witness asked him how things were in Gibson City, which Ely replied that he was no longer in Gibson City, and then turned sharply away, left the witness, and entered the elevator. The court refused to admit this evidence and we think the ruling was erroneous. The fact that the witness and Ely were acquainted with each other and greetings were extended and acknowledged between them on the date of their alleged meeting is a circumstance which tends to strengthen the witness's claim of identification and to remove the possibility of a mistake. The alleged admission of Ely that he was not living in Gibson City, his failure to tell the witness where he was residing and his heavy and unceremonious departure, were circumstances tending to show that his absence from home and his omission to make known his whereabouts to those who were entitled to receive such knowledge, was of intention and design. The offered testimony of this witness, if true, was of the utmost importance to appellant, and it relied upon by a jury, constitutes a complete defense in this case. Appellant was not permitted to make certain other proof, which ought to have been admitted for the reasons we have given here. To specifically set forth each instance would extend this opinion without advantage. Our views can be readily understood and what we have herein said will be a sufficient guide in another trial. We are of the opinion that the declarations of Dr. Ely and indeed, every circumstance tending to show his character, habits, family relationship, and financial condition are admissible. (Reedy v. Williston, supra.) Appellant is also entitled to the witness Dr. Ely's testimony and is entitled to testify as to his conversation with the witness at the time he left the room, from the evidence of Ely.

10.

Morris home "the doctor nodded acquiescence". It is contended that only such conversations with the insured as are part of the res gestae could properly be admitted and that such conversation does not come within that class; also that the witness stated a conclusion in the words quoted. Although the form of the answer is open to criticism, still, the witness should be allowed to tell what Dr. Ely did. The objection that the conversation is not a part of the res gestae cannot be sustained. (C. & E. I. R. R. Co. v. Chancellor 165 Ill. 438; Neice v. C. & A. R.R. Co. 165 Ill. App. 627.)

It is further objected that Mrs. Ely was permitted to testify to various declarations made by her husband to her, chief among them being what he said to her over the telephone, the night of October 29th., after he had left the McNamara home, and that under Section 5 of the Act on Evidence, she was not competent to testify to such declaration. The abstract in this case does not show that any objection was made to the competency of the witness. In the absence of such an objection, in the trial court, it is waived. (Doty v. Doty 159 Ill. 46; Dacy v. Goll 150 Ill. App. 9).

Objection is also made to the giving of instructions 2-4 -6-7-8 for the plaintiff. Instructions 2 and 4 are criticised because they direct the jury to consider the evidence "in the light of your own common observations and experience as men in the affairs of life". The instructions are not subject to the objection made. (People v. Turner 265 Ill. 594.) Instruction No. 6 was doubtless intended to be based on certain testimony of Mrs. Ely but the situation set forth in the instruction is so much at variance with her testimony that it makes the instruction justly subject to criticism. It should not have been given.

10. The court in *People v. Turner*, 255 Ill. 525, held that the testimony of a witness who is not competent to testify to such declarations is inadmissible. In this case, the witness, Mrs. Ely, was permitted to testify to various declarations made by her husband to her, chief among them being what he said to her over the telephone the night of October 29th, after he had left the telephone booth, and that under Section 2 of the Act on Witnesses, she was not competent to testify to such declarations. The objection in this case does not show that any objection was made to the competency of the witness. In the absence of such an objection, in the trial court, it is waived. (Duffy v. Duffy, 129 Ill. 46; Duffy v. Duffy, 150 Ill. App. 9).

Objection is also made to the giving of instructions 2-4 and 3-5 for the plaintiff. Instructions 2 and 4 are entitled "Because they direct the jury to consider the evidence in the light of your own common observations and experience as men and women of like age, intelligence and education." The instructions are not subject to the objection made. (People v. Turner, 255 Ill. 525).

Instruction No. 5 was likewise held to be proper on certain testimony of Mrs. Ely, but the attention set forth in the instructions is so much at variance with her testimony that it would be inadvisable to submit it to the jury. It should not have been given.

It is further objected that Mrs. Ely was permitted to testify to various declarations made by her husband to her, chief among them being what he said to her over the telephone the night of October 29th, after he had left the telephone booth, and that under Section 2 of the Act on Witnesses, she was not competent to testify to such declarations. The objection in this case does not show that any objection was made to the competency of the witness. In the absence of such an objection, in the trial court, it is waived. (Duffy v. Duffy, 129 Ill. 46; Duffy v. Duffy, 150 Ill. App. 9).

Objection is also made to the giving of instructions 2-4 and 3-5 for the plaintiff. Instructions 2 and 4 are entitled "Because they direct the jury to consider the evidence in the light of your own common observations and experience as men and women of like age, intelligence and education." The instructions are not subject to the objection made. (People v. Turner, 255 Ill. 525).

Instruction No. 5 was likewise held to be proper on certain testimony of Mrs. Ely, but the attention set forth in the instructions is so much at variance with her testimony that it would be inadvisable to submit it to the jury. It should not have been given.

Objection is also made to the giving of instructions 2-4 and 3-5 for the plaintiff. Instructions 2 and 4 are entitled "Because they direct the jury to consider the evidence in the light of your own common observations and experience as men and women of like age, intelligence and education." The instructions are not subject to the objection made. (People v. Turner, 255 Ill. 525).

Instruction No. 5 was likewise held to be proper on certain testimony of Mrs. Ely, but the attention set forth in the instructions is so much at variance with her testimony that it would be inadvisable to submit it to the jury. It should not have been given.

11.

Complaint is made against appellee's instruction No. 7 because it tells the jury that unexplained absence for seven years, without any intelligence as to his whereabouts, after a diligent search, raises a presumption of death. It is contended that this instruction is erroneous because it ignores the evidence offered to rebut the presumption. A similar instruction was held not to be error, under the circumstances of the case, in *Policemen's Benevolent Ass'n, R. Ryce* 213 Ill. 9. The Supreme Court in that case did not hold the instruction, when standing alone, to be good, but held that when it is considered together with other given instructions, it was not subject to the criticism made against it. In the present case instructions were given on behalf of the defendant which told the jury that the law does not presume death at the end of seven years from the time of disappearance if the jury believe from the evidence that during or after the expiration of seven years, the absentee was alive. Where rebutting evidence has been offered, it takes the two instructions together to make a correct charge. And the Supreme Court in the later case of *Kennedy v. Modern Woodmen, supra*, announces the correct rule to be, that such presumption arises from proof of the facts mentioned in appellee's said instruction, unless there are other facts and circumstances shown which rebut and overcome the presumption of death. This latter element cannot be ignored, and if it is not set out somewhere in the series of instructions, then such an instruction as No. 7 in this case would undoubtedly be erroneous. It is obvious that the presumption of death must arise upon the whole proof and not upon a part of it. But, as we have said, the instruction when considered with others in this case, as a series, is not prejudicial.

Instruction No. 8 is an abridged statement of the appellant's contractual liability under the policy of insur-

Complaint is made against appellee's instruction No. 7 because it tells the jury that unexplained absence for seven years, without any intelligence as to his whereabouts, after a diligent search, raises a presumption of death. It is contended that this instruction is erroneous because it ignores the evidence offered to rebut the presumption. A similar instruction was held not to be error, *People v. ...* of the case, in *People v. ...* 218 Ill. 2d. The Supreme Court in that case did not hold the instruction, when standing alone, to be good, but held that when it is considered together with other given instructions, it was not subject to the criticism made against it. In the present case instructions were given on behalf of the defendant which told the jury that the law does not presume death at the end of seven years from the time of disappearance if the jury believe from the evidence that during or after the expiration of seven years, the decedent was alive. Where rebutting evidence has been offered, it takes the two instructions together to make a correct charge. And the Supreme Court in the latter case of *People v. ...* announced the correct rule to be, that such presumption arises from proof of the facts mentioned in appellee's instruction, unless there are other facts and circumstances shown which rebut and overcome the presumption of death. This latter element cannot be ignored, and if it is not set out somewhere in the series of instructions, then even an instruction as No. 7 in this case would undoubtedly be erroneous. It is obvious that the presumption of death must arise upon the whole proof and not upon a part of it. For, as we have said, the instruction was considered with others in this case, as a series, as the jury

ance, and in its form is both inaccurate and misleading. The company did not, by its policy, promise to pay to the personal representatives of the insured, \$25,000 upon due proof of death, while the policy was in force. The first paragraph of the policy makes the payment of said sum subject to certain specified terms and conditions incorporated in the contract, of which the condition that "proof of death while the policy was in force" is but one.

For the errors set forth, this judgment will be reversed and the cause remanded for a new trial.

Reversed and Remanded.

... and in the first instance, the ...
 ... by the policy, ...
 ... of the ...
 ... while the policy was in force. The first paragraph ...
 ... of said and was subject to ...
 ... and conditions incorporated in the ...
 ... of which the condition that "proof of death while ...
 ... the policy was in force, is but one. ...
 ... for the error not forth, this judgment will be reversed ...
 ... and the case remanded for a new trial. ...
 ... it was not ...
 ... Reversed and Remanded.

... were given on behalf of the ...
 ... the law does not require ...

... the ...
 ... the two ...
 ... the Supreme Court in the ...
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... the investigation was ...
 ... in this case, as a matter, is not ...

STATE OF ILLINOIS, {
SECOND DISTRICT. ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 26th day of
May in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.



7385

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 638³

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:



The People of the State of
Illinois, Defendant in Error
vs
Julius Van Nevel and Theophiel
Martens, Plaintiffs in Error,

Jones, P. J.

Error to County
Court of Rock
Island County

238 I.A. 638

This is a prosecution begun in the county court of Rock Island County against the defendants upon an information consisting of two counts, each charging the unlawful possession of intoxicating liquor on the 17th day of October 1923. There was a trial before a jury, which returned a verdict finding the defendants guilty upon both counts of the information. After overruling a motion for a new trial, the court entered judgment on the verdict, sentencing the plaintiff Martens to pay a fine of \$400 for a violation of the first count and to imprisonment in the county jail for sixty days for a violation of the second count, and sentencing Van Nevel to pay a fine of \$100 for a violation of the first count and to sixty days imprisonment for a violation of the second count.

Previous to the trial, the defendants moved to quash the information which motion was overruled. This is assigned as error. The first count of the information charged that the defendants "did then and there unlawfully and wilfully acquire and possess intoxicating liquor with the intent then and there to use the same in violation of the Prohibition Law of the State of Illinois. . . ."

The second count charged that the defendants "did then and there unlawfully and wilfully keep for sale intoxicating liquor with the intent then and there to sell the same contrary

The People of the State of

Illinois, Defendant in Error

vs

Julius Van Navel and Theophil

Marlene, Plaintiff in Error,

State of Illinois

County of Cook

Illinois County

2381.A.638

Jones, E. J.

This is a prosecution begun in the county court of Cook

Leland County against the defendants upon an information consisting of two counts, each charging the unlawful possession of intoxicating liquor on the 17th day of October 1922. There was a trial before a jury, which returned a verdict finding the defendants guilty upon both counts of the information. After overruling a motion for a new trial, the court entered judgment on the verdict, sentencing the plaintiff Marlene to pay a fine of \$100 for a violation of the first count and to imprisonment in the county jail for sixty days for a violation of the second count, and sentencing Van Navel to pay a fine of \$100 for a violation of the first count and to sixty days imprisonment for a violation of the second count.

Previous to the trial, the defendants moved to quash the information which motion was overruled. This is claimed as error. The first count of the information charges that the defendants "did then and there unlawfully and wilfully sell, give, possess, transport, deliver with the intent that they should be used the same in violation of the prohibition law of the

to the provisions of the Prohibition Law of this State"

Both counts in the information are based on Sec. 28 of the Illinois Prohibition Law, which is as follows-"It shall be unlawful to have or possess any liquor intended for use in violating this act or property designed for the illegal manufacture of liquor and no property right shall exist in any such liquor or property." Each count charges the same offense and substantially in the language of the statute. The question is therefore whether or not the language so employed is comprehensive enough to constitute a proper charge under said section.

This precise question was before the Supreme Court of this state in the case of the People v. Barnes 314 Ill. 140. In that case there was an indictment consisting of several counts. The fifth count was grounded on said section 28 and charged that the defendant "unlawfully did then and there have in her possession property designed and intended for use in the unlawful manufacture of intoxicating liquor." The Supreme Court held that under the act, possession of intoxicating liquor was lawful or unlawful according to the circumstances under which it was possessed; that to charge the possession was unlawful or was intended for use in violating the law was a mere conclusion of the pleader and "where an act is not in itself necessarily unlawful, but becomes so by its circumstances, all the matters necessary to show its illegality must be stated in the indictment or information." It was also held that "It is not sufficient to charge an offense in the language of the statute alone, where by its generality it may embrace acts which it was not the intent of the statute to punish. Such facts must be alleged that, if proved, defendant cannot be innocent."

to the provisions of the Prohibition Law of this State . . .

Each count in the indictment was based on sec. 12

of the Illinois Prohibition Law, which is as follows:-

shall be unlawful to have or possess any liquor intended for
use in violating this act or thereby designed for the illegal
manufacture of liquor and no property right shall exist in any
such liquor or property." Each count charges the same offense
and substantially in the language of the statute. The question
is therefore whether or not the language so employed is con-
fessionary enough to constitute a proper charge under said

section.

This precise question was before the Supreme Court of this

State in the case of the People v. Harvey 214 Ill. 180. In

that case there was an indictment consisting of several counts.

The fifth count was phrased as follows: "That the defendant

has unlawfully and intentionally sold and there have in his

possession property intended and intended for use in the un-

lawful manufacture of intoxicating liquor." The Supreme Court

held that under the act, possession of intoxicating liquor

was lawful or unlawful according to the circumstances under

which it was possessed; that to charge the possession was un-

lawful as was intended for use in violating the law was a mere

recitation of the plea and "there was not in itself

any unlawfulness suggested, but because so by the circumstances,

all the matters necessary to show the illegality were set forth

in the indictment or information." It was also held that it

is not sufficient to charge an offense in the language of the

statute alone, where by its construction it may embrace acts

which it was not the intent of the statute to punish. Such

acts must be alleged that, if proved, would amount to

violation."

It was there urged by the State's Attorney that the various counts of the indictment were good and sufficient under Sec. 40 of said Act, which provides that, "The possession of liquors by any person not legally permitted under this Act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, given away, furnished, or otherwise disposed of in violation of the provisions of this Act." The court disposed of this contention by saying that the presumption arises only from possession by a person not legally permitted under the Act to possess liquor. If the possession is lawful by authority of the Act, then no such presumption can arise.

In the case at bar, as in the Barnes case, no additional fact was alleged in any count, from which unlawful conduct by the plaintiff in error can be inferred. The words "unlawfully" and "unlawful" and "in violation of the Prohibition Law of the State of Illinois" are tantamount to the same thing and state no fact. They are but conclusions of the pleader and hence are ineffective. Without the particular unlawful circumstances of the possession being alleged, such ineffective terms are meaningless and the charges in the information in this case are merely that the plaintiff in error possessed intoxicating liquor. This of itself is not in violation of the Prohibition Law. Each count of the information in this case is therefore, insufficient to sustain a conviction and the cause is accordingly reversed and remanded.

Reversed and Remanded.

It was there urged by the State's Attorney that the
... of the indictment were good and sufficient
... of this Act, which provides that, "the possession
... by any person not lawfully permitted under this Act
... shall be prima facie evidence that such person
... of being sold, transferred, given away,
... or otherwise disposed of in violation of the pro-
... of this Act." The court disposed of this objection
... that the prosecution relies only upon possession by
... not lawfully permitted under the Act as prima facie
... in favor of validity of the Act, then no
... and evidence are added.

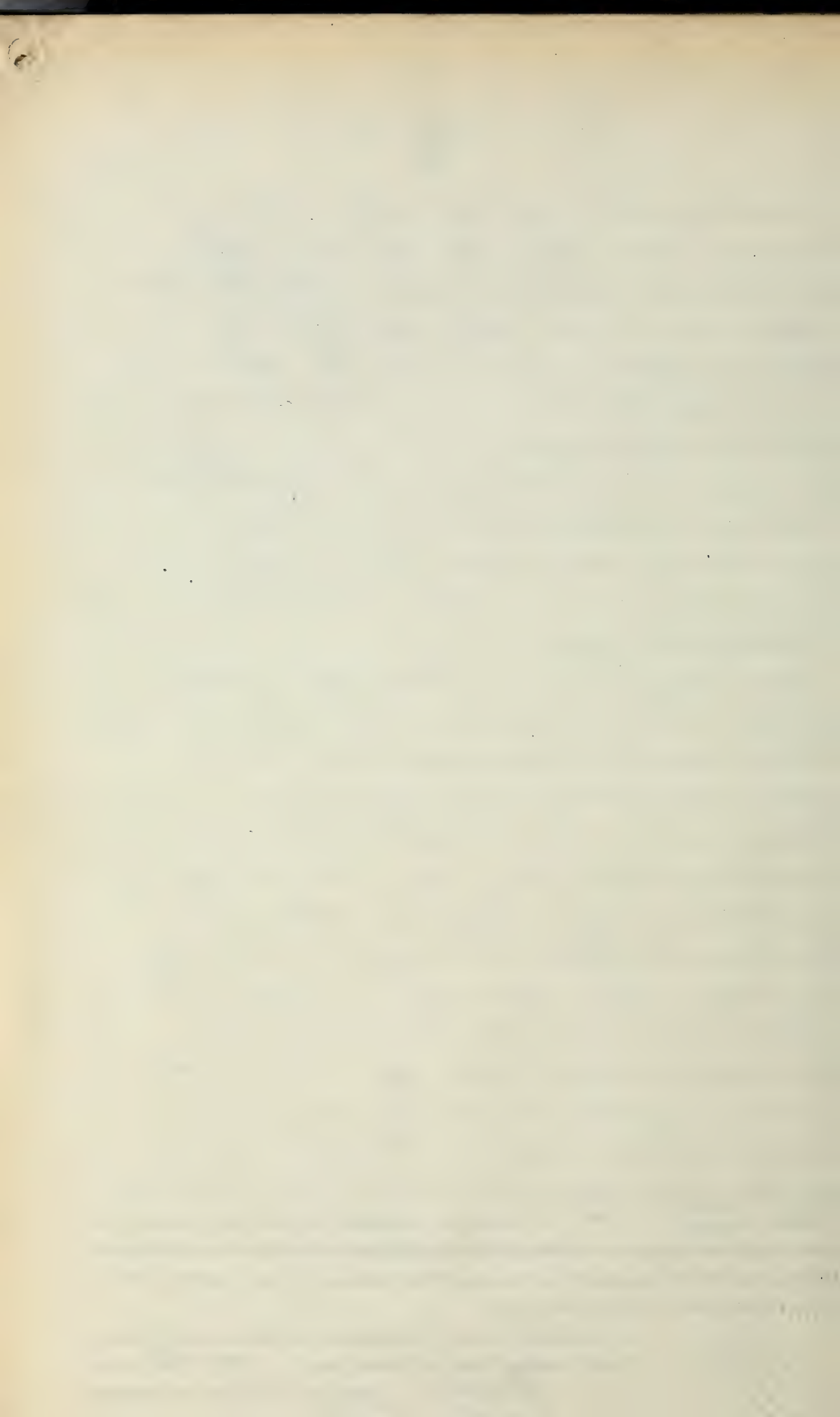
In the case at bar, as in the Burton case, an addition-
... is alleged to be correct, from which no valid con-
... by the plaintiff in error can be inferred. The words
... "lawfully" and "not lawfully" are violative of the
... of the State of Illinois, are tantamount to
... and state as fact. They are not conclusions
... and hence are ineffective. Without the con-
... circumstances of the possession being alleged,
... are meaningless and the charges in the
... that the plaintiff is
... that of itself is not
... of the provisions of the Act. Even if it is
... in this case is irrelevant, immaterial and useless.
... and the same is substantially repeated and repeated.

Reversed and Remanded.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.



7395
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 638⁴

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:



1.

Agenda No. 23

General No. 7395

Sam Dudley, Appellant,

v.

Inglaterra Amusement Co.,
a corporation, Appellee

Appeal from Circuit
Court of Winnebago County.

Jones, P. J:

239 I.A. 638

This is an action brought by SameDudley, a negro, against appellee, under chapter 38, article 104, knows/as the Illinois Civil Rights Act of 1885. The trial in the circuit court resulted in a verdict in favor of appellee and appellant perfected an appeal to this court.

The Inglaterra Amusement Company is a corporation and conducts a dance hall in the business district of the city of Rockford. The ^{main} floor of the hall is about 83 feet long. The entrance is on the West. Immediately inside the entrance, there is a lobby and ticket office. There is a partition between the lobby and the dance hall. Entrance to the hall is through a set of wooden doors. Immediately East of this partition is a space which is usually reserved for a promenade or gathering place for guests, while they are not dancing. Separating this promenade from the portion reserved for dancing, is a permanent railing about four feet high. The space reserved for dancing is the entire width of the building and from the railing to the East end of the building, about one hundred feet.

On March 28th, 1922, appellee caused an advertisement to be made in the local newspapers that Mamie Smith and "her Jazz Hounds" would be at the Inglaterra on that night and the following night. A concert would be given from 8 o'clock to 9:15 o'clock and dancing from 9:15 o'clock to 12 o'clock. The advertisements further stated that "Mamie Smith's Jazz Hounds will furnish the Music for Dancing. Doors open 7 o'clock-
No seats ^{ts} Reserved.

General W. H. Hays

Agent No. 10

San Diego, California

7.

Investigation conducted by
a confidential agent

Report of Agent No. 10
Court of California County

888 A. 1. 688

June 1, 1911

This is an action brought by defendant, a party,
against plaintiff, under Chapter 10, Article 10, known as
the Illinois Civil Rights Act of 1908. The facts are the
plaintiff sought to be a witness in favor of plaintiff and
defendant parties on appeal to this court.

The defendant, however, is a corporation and
owns a dance hall in the business district of the city of
Chicago. The name of the hall is given in the bill of
lading. The defendant is on the bill. Immediately inside the entrance,
there is a lobby and ticket office. There is a partition between
the lobby and the dance hall. Entrance to the hall is through
a set of wooden steps. Immediately West of this partition is
a space which is usually reserved for a promenade or dancing
place for guests, which they are not allowed. Reserved for
promenade from the further reserved for dancing, is a promenade
running about four feet high. The space reserved for dancing
is the entire width of the building and from the wall to
the East end of the building, about one hundred feet.

On March 20th, 1911, plaintiff danced an entertainment
to be held in the hotel restaurant that night and the
"Luna Rumba" would be at the restaurant on that night and the
following night. A contract would be given them to be given in
the hotel and dancing from 8 o'clock to 12 o'clock.

First Come--First Served--Seats for 800. Tickets on sale at the Brunswick Shop." Dudley saw an advertisement and purchased three seats at the Brunswick Shop.

Along the North and South sides of the building, were balconies, provided with chairs. In order to accomodate the extra patrons on the night in question, chairs were place in the space ordinarily used as a promenade, an aisle being left through the center from the entrance to the space reserved for dancing. Two rows of chairs were place just inside the railing. On the night of the first concert, appellant accompanied by his mother and another negro named Hopley, went to the Inglaterra, where he presented the tickets he had bought. They were accepted by the doorkeeper, and appellant, with his party, took seats on the aisle and immediately next to the said railing. He testified no one objected to his taking the seats at the time, but later he was ordered to go to the North Balcony or leave the building; that he refused to do this, saying that he had come early to get good seats because the advertisement had read "First Come--First Served--No Reserved Seats"; that thereupon a police officer in uniform came to him and told him that he and his party would have to go to the balcony or get out of the place and if they refused to do either, he would take them to jail and lock them up; and that the plaintiff and his guests then left the hall. The testimony of appellant is corroborated by other witnesses. But that part of it, which relates to the conversations within the building is denied by witnesses for the appellee.

R. W. Miller, employed at the Inglaterra, testified that he was directing the people who entered where to be seated; that although there were no reserved seats, it was the plan of the management to fill the balconies first; and that as Dudley and his party entered, he directed them to go to the balcony. Dudley made no reply but walked directly to the seats which he

Three Come--First served--Last for 200. These are also at the Keweenaw Shop. They are an advertisement and purchased three weeks at the Keweenaw Shop.

Along the North and South sides of the building, were balconies, provided with chairs. In order to accommodate the extra patron on the night in question, chairs were placed in the space originally used as a promenade, an aisle being left through the center from the entrance to the space reserved for smoking. Two rows of chairs were placed just inside the railing on the right of the first balcony, appearing unoccupied by his mother and another negro woman highly, next to the balcony, where he presented the tickets he had bought. They were accepted by the ticket agent, and upon that, with his party, took seats on the aisle and immediately went to the rail railing. He testified he was objecting to him taking the seats at the time, but later he was ordered to go to the North balcony to leave the balcony; that he refused to do this, saying that he had some early to get back home because the advertisement had read "First Come--First Served--No Reserved Seats"; that therefore a police officer in uniform came to him and told him that he and his party would have to go to the balcony to get out of the place and if they refused to do either, he would take them to jail and keep them up; and that the defendant and his friends then left the hall. The testimony of applicant is corroborated by other witnesses. But that part of it, which relates to the conversation which the witness is quoted as having had with the applicant.

H. W. Miller, employed at the Keweenaw, testified that he was assisting the people who entered when he heard that although there were no reserved seats, it was the plan of the management to fill the balconies first; and that he might

section Dudley took. After Dudley was seated, the witness went to him and again told him to go to the balcony as no one would be permitted to sit there until the balconies were filled. Dudley persisted in his refusal. Mr. Breinig, the manager, also asked Dudley to take a seat in the north balcony. Edward Mc-Namara, the ticket taker, testified he told Dudley, as he took up the tickets, to go upstairs and that he did so because he had received instructions that night to fill the balconies first. Ely F. Ward, the police officer, denied that he threatened to put appellant in jail, but said that he told him he would either have to go into the north balcony or leave the building.

There is evidence tending to show that the management desired to fill the balconies before the seats on the main dance floor were taken, and that it also desired to segregate the blacks from the whites by putting the negroes in the north balcony and the white people in the south balcony. So far as comfort, accommodations and opportunity to see and hear are concerned, there was no difference between the two balconies.

It is not contended that the jury in this case acted through any prejudice or bias. But it is claimed by appellant that the verdict is the result of the admission of improper evidence, the giving of erroneous instructions on behalf of the appellee and the refusal to give proper instructions on behalf of appellant.

Section 1 of the Illinois Civil Rights Act is as follows:
 "Section 1. That all persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, saloons, barber shops, bathrooms, theaters, skating rinks, concerts, cafes, bicycles (bicycle) rinks, elevators, ice cream parlors, or rooms, railroads, omnibuses, stages, street cars, boats, funeral hearses and public conveyances on land and water, and all other places of public accommodation

and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead, but the price to be charged and paid for lots in any cemetery or place for burying the dead shall be applicable alike to all citizens of every race and color."

Counsel for appellant insist, that the entertainment given was a concert and therefore is one of the enumerated places in which all persons, without regard to race or color, are entitled to the full and equal enjoyment of accommodation, advantage, facilities and privileges, and that it was denied to appellant, because of his race and color.

On the other hand it is the contention of appellee that the entertainment cannot be properly termed a "concert" that the place in which it was held was well known to be a dance hall and maintained for that purpose; that the music offered during the early part of the evening was only preliminary and incidental to the dance program; that the statute does not specifically mention dance halls, nor are they included within the terms of the statute under the doctrine of ejusdem generis; and that the statute does not contemplate the full and equal enjoyment of accommodations, advantages, etc., among people of different races and colors, at a public dance hall. Appellee further contends that regardless of what construction may be given to the Civil Rights Act, appellee had the right, in the management of its hall and entertainment, to compel the seating of all patrons in the balconies until the same were filled, and that it was in the exercise of this right that appellant was told to move from where he took his seat.

We will first determine whether public dances come within the purview of the statute. It is not our purpose to decide whether the amusement in question was a concert, a public dance or a combination of both.

and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead, but the price to be charged and paid for lots in any cemetery or place for burying the dead shall be applicable alike to all citizens of every race and color."

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On the other hand it is the contention of appellee that the entertainment cannot be properly termed a "concert" that the place in which it was held was well known to be a dance hall and maintained for that purpose; that the music offered during the early part of the evening was only preliminary and incidental to the dance program; that the statute does not specifically mention dance halls, nor are they included within the terms of the statute under the doctrine of ejusdem generis; and that the statute does not contemplate the full and equal enjoyment of accommodations, advantages, etc., among people of different races and colors, at a public dance hall. Appellee further contends that regardless of what construction may be given to the Civil Rights Act, appellee had the right, in the management of its hall and entertainment, to compel the seating of all patrons in the balconies until the same were filled, and that it was in the exercise of this right that appellant was told to move from where he took his seat.

We will first determine whether public dances come within

Its character is to be determined as a question of fact and not of law. Our purpose is to construe the statute so as to test the correctness of the instructions offered, and the materiality of the evidence admitted.

The Civil Rights Act, as it was passed in 1885, specifically enumerated the following, only:- inns, restaurants, eating houses, barber shops, public conveyances on land and water and theaters. The first case under that act brought before the Supreme Court of this state was Baylies v. Curry 128 Ill. 287. This case arose over the refusal of a theater management to permit colored persons to occupy certain seats. The defense sought to be interposed was that in order to avoid a collision between the races, a rule was adopted allowing colored people to have one row to themselves in each part of the house, or as many rows as the tickets which they bought would call for. The Supreme Court held such defense to be unavailing and that a denial of access to the theater or to the several circles or grades of seats therein, because of race or color, is prohibited by statute.

161 Ill. 265

The case of Cecil v. Green originated before the amendment of 1911 was made to the Civil Rights Act. In this case the proprietor of a drug store kept a soda fountain. He refused to sell or serve soda water to a negro, on account of his race and color; Suit was brought under the act and the Supreme Court held that such a place did not come within the terms of the statute and that the proprietor had the right to discriminate between races, if he chose to do so.

Subsequent to the decision in Cecil v. Green, supra, the legislature amended the act by including in the places specifically enumerated, soda fountains, saloons, bath rooms, skating rinks, concerts and various other places hereinbefore mentioned thereby very materially enlarging the scope of the act.

The character is to be determined as a question of fact and not of law. Our purpose is to consider the statute as it is, and the extraneousness of the limitations offered, and the materiality of the evidence admitted.

The Civil Rights Act, as it stands in 1964, specifically enumerated the following: race, color, religion, sex, and national origin. These categories are listed as factors which are prohibited in housing, public accommodations, and employment. The first case under this act was *Keyes v. Board of Education* of the City of Denver, 397 U.S. 1218 (1970). This case arose over the refusal of a housing management to permit a colored person to occupy certain units. The defense sought to introduce evidence that in order to avoid a collision between the races, a rule was adopted allowing colored people to live in one part of the building and white people in another, or as many white people as the building which they bought would allow for. The Supreme Court held that such a rule was unconstitutional and that a racial or ethnic division in the housing or in the several divisions or sections of units thereby, because of race or color, is prohibited by statute.

THE CIVIL RIGHTS ACT
The case of *Keyes v. Board of Education* before the Supreme Court of 1970 was cited in the Civil Rights Act. In this case the plaintiff of a group there had a case against the defendant to sell or lease home under a contract, on account of his race and color. This was brought under the act and the Supreme Court held that such a case was not within the terms of the statute and that the plaintiff had the right to discriminate between races, if he chose to do so. Reference to the decision in *Keyes v. Board of Education*, and the Supreme Court's decision to not be included in the phrase "race, color, religion, sex, and national origin" was made.

In *People ex rel v. Forest Home Cemetery Company*, 258 Ill. 36, burial privileges were refused a colored person and the court held that a cemetery association, not vested with the right of eminent domain, was not included within the statute under the doctrine of *ejusdem generis*. The trend of authority is that the act, being in derogation of the common law and penal in its nature, is strictly construed and that unless it appears that a place is among those enumerated by the statute, or is included under the doctrine of *ejusdem generis*, discrimination because of race or color is not prohibited.

While neither the Supreme Court nor the Appellate Courts of this state have determined whether or not a dance hall is included within the terms of the statute, the question has been decided by the New York Court of Appeals in *Johnson v. A. & S. E. R. Co.* 222 N. Y. 443. The New York statute is very much like the Illinois statute. The court held that a dancing pavilion is within the provisions of a statute entitling all persons to full and equal advantages and privileges of public accomodation and amusement. The dancing pavilion was operated in connection with a railroad company and for its financial benefit. The court laid some stress upon this feature in deciding the case, but, nevertheless, we think that the reasoning advanced by the court in concluding that the pavilion came within the provisions of the statute, is exceedingly convincing.

Ohio has a similar statute and in the case of *Youngstown Park & F. S. Ry. Co. v. Tokus* 22 Ohio C. C. N. S. 417, it was held that a public dancing pavilion is a place of public accomodation and amusement. In this case a colored person, because of his color, was ejected from the pavilion after he had purchased a ticket and entered for the purpose of dancing.

In *People ex rel v. Turner* (1892), 123
N.Y. 36, certain privileges were refused a colored person
and the court held that a necessary consequence, not arising
with the right of naturalization, was not excluded within
the statute under the doctrine of stated grounds. The court
of authority is that the act, being in derogation of the common
law and hence in its nature, is strictly construed and that
unless it appears that a class is excepted from consideration by
the statute or is included under the doctrine of stated
grounds, discrimination because of race or color is not
permitted.

While neither the Supreme Court nor the Appellate
Court of this state have determined whether or not a person
shall be included within the terms of the statute, the question
has been settled by the New York Court of Appeals in *Turner*
v. A. B. N. Y. Co. and *N. Y. Co.*. The New York statute is
very much like the Illinois statute. The court held that a
colored person is within the provisions of a statute excluding
all persons of full and equal advantages and privileges of
white persons and citizens. The Illinois provision was
operated in connection with a railroad company and for its
exclusive benefit. The court held that it was not
intended to exclude the case, but, nevertheless, we think
that the reasoning followed by the court in *Turner* leads
the provision came within the provisions of the statute, is
exceedingly convincing.

This has a similar state and in the case of *Turner*
v. A. B. N. Y. Co. and *N. Y. Co.* it was
held that a colored person is a person of white
race and color and citizenship. In this case a colored person,
because of his color, was ejected from the railway after

Because of these authorities as well as our own conception of the proposition, we are of the opinion that appellee was conducting a place within the scope of the statute. This conclusion, of course, makes it unnecessary for us to comment upon the errors contained in the instructions given on behalf of the appellee and complained of by appellant. In view of the opinion of the Supreme Court in *Baylies v. Curry*, supra, we are bound to hold that the testimony, which was admitted for the purpose of showing that the accommodations offered colored people were equally as good as those offered to the whites, was incompetent and immaterial, and the instructions based on that theory are erroneous. We are aware of a contrary view in many other jurisdictions where the courts have held that segregation does not necessarily mean discrimination.

According to our view, appellee had no right to exclude the appellant either from the hall or from any particular part thereof, on account of race or color, and this without regard to whether the entertainment was a concert or a public dance. It is also our view that appellee had the right, in the management of its enterprise, to require all patrons to occupy seats in the balconies and to refuse to permit persons to occupy seats on the main floor until the balconies were filled; and further that it had the right, under such circumstances, to compel persons holding seats on the main floor to vacate them and occupy balcony seats until the same were filled. In this case it is not within our province to decide the facts. Whether appellant was forced to vacate his seat, because he was being discriminated against on account of color, or because he refused to comply with the management's plan to fill the balconies first, is not a question for us to decide. It must be left to a jury to determine.

Appellant urges that the court should have given his refused instructions numbered 1 and 2. While there is no inherent ~~vile~~ to be found in refused instruction No. 1, its

Because of these authorities as well as our own conception of the proposition, we are of the opinion that appellee was entitled to a place within the ranks of the state. This conclusion, of course, makes it unnecessary for us to repeat again the errors contained in the instructions given as to the of the appellee and explained by ourselves. In view of the opinion of the majority in *Boyd v. City*, *Boyd v. City*, we are bound to hold that the testimony, which was admitted for the purpose of showing that the respondent was a colored person, was equally as good as those offered to the other, was inconsistent and immaterial, and the instructions based on that theory are erroneous. We are aware of a contrary view in many other jurisdictions where the courts have held that such testimony does not necessarily make inadmissible. According to our view, appellee had no right to exclude the respondent either from the trial or from any further proceedings, on account of race or color, and this without regard to whether the establishment was a company or a public house. It is also our view that appellee had the right, in the management of the enterprise, to require all persons to occupy seats in the balcony and to refuse to permit persons to occupy seats on the main floor until the balcony was filled; and further that it had the right, under such circumstances, to require persons sitting seats on the main floor to vacate them and occupy balcony seats until the seats were filled. In this case it is not within our province to decide the facts. Whether appellee was bound to receive his seat, because he was being discriminated against on account of color, or because he refused to comply with the management's plan to fill the balcony first, is not a question for us to decide. It must be left to a jury to determine.

8.

refusal could not possibly work any injury. Refused instruction No. 2 is long and argumentative. It was properly refused.

Because of errors in instructions and in admitting evidence, this cause is reversed and remanded.

Reversed and Remanded.

100-443887-100

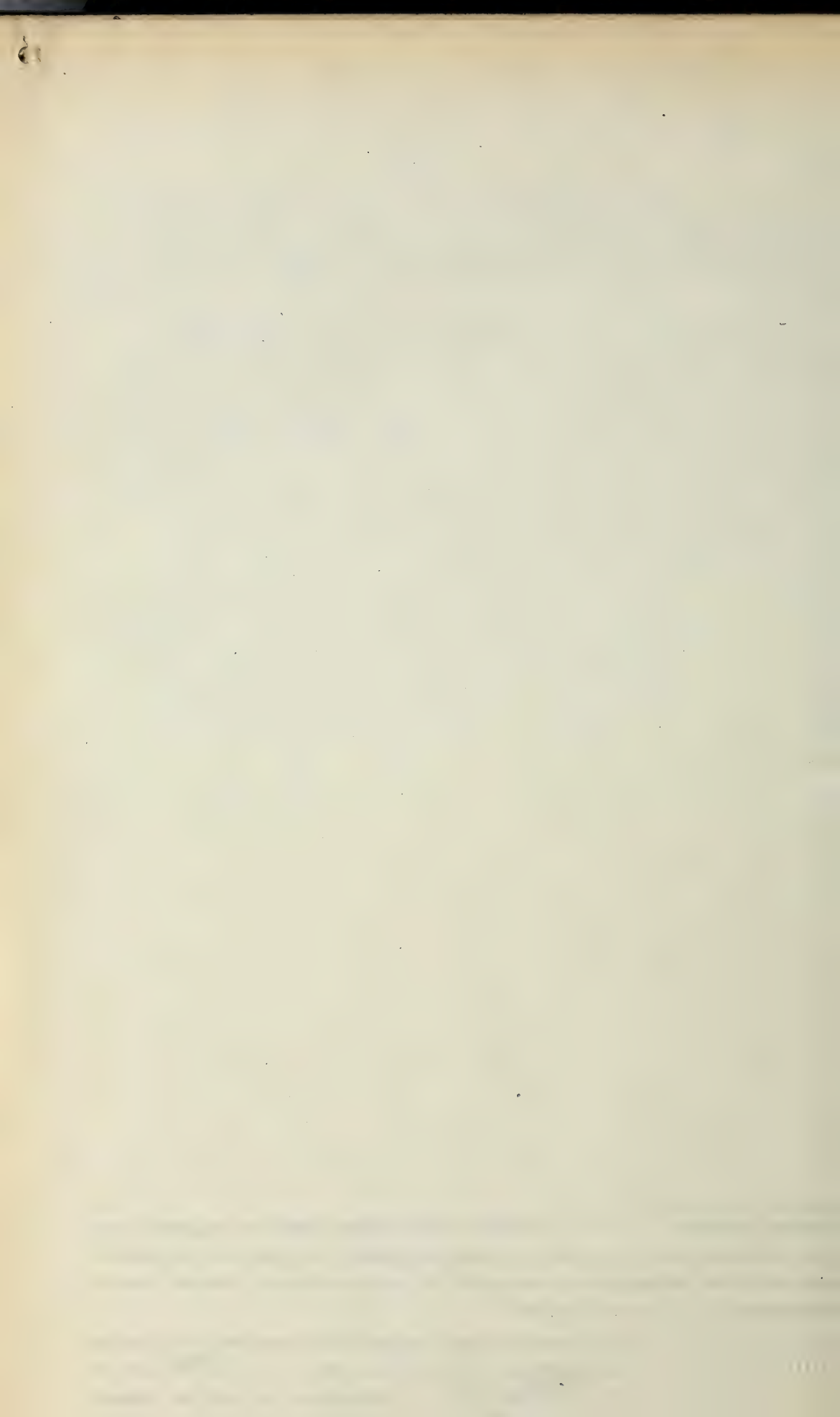
...the

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STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.



7443

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 638⁵

BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

1875-1876

...

...

Daniel Whisler, Appellant

v.

Appeal from
Circuit Court
of Warren County

First National Bank of Galesburg
et al, Appellees

238 I.A. 638

Jones, P.J.:

This is an appeal from a decree of the circuit court dismissing a bill for foreclosure of a real estate mortgage for want of equity.

Freeman S. Stice was the owner of forty acres of land in Warren County, Illinois and engaged J.D. Stice, Cashier of the Swan Creek State Bank of Swan Creek, Illinois to negotiate for him a loan of \$8,000. Four notes, of \$2000 each, were drawn and executed by Freeman S. Stice, all dated March 1st, 1920, and due March 1st, 1925 with interest thereon at 5½% Per annum until maturity and 7% after maturity. The notes had interest coupons attached.

Three of the notes were made payable to E.C. Hardin, who was cashier of the Second National Bank of Monmouth, Illinois. To secure the payment of the said three notes, the owner of the land executed a mortgage thereon to the said E.C. Hardin. The other of said notes was made payable to J.D. Stice, and the mortgage to secure its payment was also made to him. On the next day, March 2nd, both of said mortgages were duly acknowledged, and J.D. Stice went to Monmouth, and at the said Second National Bank, sold the notes and mortgage made to Hardin to the appellant Whisler for the full sum of \$6000. J.D. Stice represented to Whisler that the notes and mortgage he was transferring to him constituted a first lien upon the mortgaged premises. The notes were duly endorsed by Hardin "without recourse". Stice then sent both mortgages to the recorder with a pencil memorandum thereon

January 20, 1900

January 20, 1900

United States, Chicago

Y.

Chicago, Ill.
January 20, 1900

First National Bank of Chicago
at Chicago, Ill.

388 I.A. 688

Chicago, Ill.

This is to certify that a check of the amount of
Twenty-five hundred and no/100 dollars was
paid to the order of the Chicago National Bank
on the 20th day of January, 1900.

Witness my hand and the seal of the Chicago National Bank
this 20th day of January, 1900, at Chicago, Illinois.
Attest: J. H. Smith, Cashier
The Chicago National Bank of Chicago, Illinois
is a corporation organized under the laws of the State of Illinois
and has a capital of \$1,000,000. It is a member of the Federal Reserve
System and is authorized to receive deposits and to make loans.
It is a member of the Chicago National Bank of Chicago, Illinois.
The Chicago National Bank of Chicago, Illinois, is a corporation
organized under the laws of the State of Illinois and has a capital
of \$1,000,000. It is a member of the Federal Reserve System
and is authorized to receive deposits and to make loans.

Three of the notes were payable to J. H. Smith.
The balance of the notes were payable to the Chicago National Bank of Chicago, Illinois.
The Chicago National Bank of Chicago, Illinois, is a corporation
organized under the laws of the State of Illinois and has a capital
of \$1,000,000. It is a member of the Federal Reserve System
and is authorized to receive deposits and to make loans.
The Chicago National Bank of Chicago, Illinois, is a corporation
organized under the laws of the State of Illinois and has a capital
of \$1,000,000. It is a member of the Federal Reserve System
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organized under the laws of the State of Illinois and has a capital
of \$1,000,000. It is a member of the Federal Reserve System
and is authorized to receive deposits and to make loans.

2.

in his own handwriting. On the Hardin mortgage, the memorandum to the recorder was to "record first and mail to the Swan Creek Bank". The memorandum on the other mortgage was to "record second and mail to the Swan Creek Bank". Pursuant to the instructions thus given by Stice, the recorder filed the Hardin mortgage at 1:30 o'clock P.M. on the 2nd day of March 1920 and it was given instrument No. 163891. The other mortgage was given instrument No. 163896, and was filed at 1:35 o'clock P.M. of that day. After the mortgages had been recorded, they were returned to J.D. Stice, who caused Hardin to assign the mortgage made to him by an endorsement thereon. This mortgage was delivered to Whisler, who has been the holder and owner of the said three notes and mortgage ever since. J.D. Stice became and continued to be thereafter the owner of the other note and mortgage. No record of the assignment of the Hardin mortgage to Whisler, was ever made.

Freeman Stice became insolvent. The appellees herein obtained their respective judgments against him subsequent to the execution and recordation of said mortgages. He failed to pay interest or taxes. For some reason not explained in the record, but apparently without the request, consent or knowledge of either Freeman Stice or Whisler, J.D. Stice sent the interest on the notes, held by Whisler, to Hardin, who in turn paid it to Whisler. It seems that neither Hardin nor Whisler was aware of the fact that the interest was not actually paid by Freeman Stice, knowledge thereof not coming to them until a considerable time afterwards.

On March 26th, 1921, J.D. Stice, having elected to declare his note due and payable, because of failure to pay interest, etc., filed his bill of complaint against Freeman S. Stice, the appellees herein, six in number and also against

certain other persons, including E.C. Hardin. The appellant Daniel Whisler was not made a party defendant. The bill contained not specific allegations concerning the Hardin mortgage, or its assignment to Whisler. It had a general allegation that the appellees, E.C. Hardin and certain other defendants "have or claim to have some interest in said mortgaged premises or some part thereof as tenants, judgment creditors, mortgagees or otherwise, which interests, if any, have accrued and are subsequent to the lien of the mortgage of said orator and are subject thereto". The prayer of the bill asks, among other things, general relief. Hardin and Freeman S. Stice were defaulted. The cause was referred to the Master to take and report the evidence, together with his conclusions of fact and law. The Master made his report and a decree was entered thereon finding that the complainant J.D. Stice was entitled to the relief prayed for; that his mortgage was a first lien upon the premises; that there was due Hardin, on account of the mortgage and three notes hereinbefore mentioned, the sum of \$6412.48 and that said mortgage is a second lien upon the premises. It is also found that the appellees, by reason of their respective judgments, were entitled to liens upon the premises, junior however, to said mortgages. The Master was ordered to sell the premises and after paying the costs of the proceedings out of the proceeds of the sale, he was directed to pay J.D. Stice the amount found to be due on his mortgage, and if there was a surplus left, to apply the same on indebtedness found to be due Hardin. Further directions were given for the application of the proceeds of the sale to the payment of the indebtedness due the judgment creditors. These mortgages having been given while the mortgage foreclosure act of 1917 was in force, the Master, pursuant to said decree, issued to the complainant a certificate

certain other persons, including E.C. Smith. The appellant
Daniel Kishner was not made a party defendant. The bill was
filed with the clerk of the court containing the usual aver-
ments, in the complaint or petition. It was a general aver-
ment that the appellant, E.C. Smith, had certain shares
of certain "have or claim to have some interest in with
mortgage premises or some part thereof or interest, together
with, together or otherwise, which interests, it was
have occurred and was intended to be the fact of the mortgage
of said estate and the subject thereof." The object of
the bill was, among other things, general relief. Matters
and persons in issue were detailed. The same was referred
to the master to take and report the evidence, together with
his conclusions of fact and law. The master made his report
and a decree was entered thereon finding that the appellant
E.C. Smith was entitled to the relief prayed for; that the
mortgage was a first lien upon the premises; that there was
the Kishner, on account of the mortgage and that there were
before mentioned, the sum of \$441.48 and that said mortgage
is a second lien upon the premises. It is also found that the
appellant, by reason of their respective statements, were en-
titled to share upon the premises, jointly and severally, in said
mortgage. The master was ordered to sell the premises and
after paying the costs of the proceedings out of the proceeds
of the sale, he was directed to pay E.C. Smith the amount
found to be due on his mortgage, and if there was a surplus
left, to apply the same on indebtedness found to be due Kishner.
Further directions were given for the application of the
proceeds of the sale to the payment of the indebtedness and the
payment of costs. These mortgages having been given while

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of foreclosure as provided by said statute.

It appears that Whisler had no notice or knowledge of the pendency of said J.D. Stice foreclosure proceedings until sometime after the decree was entered. On September 8th, 1922, he filed his bill of complaint, in which he alleged the giving of the said three notes and mortgage and of the assignment thereof by Hardin to him. He alleged that because of the failure of the maker of the notes to pay interest, etc., he had elected to declare the entire indebtedness due. Freeman S. Stice, E.C. Hardin, the appellees herein, and all other necessary and proper persons were made parties defendant. Through answers, amendments to bill and other appropriate pleadings, the entire subject matter of the giving of all of said notes and mortgages, the assignment of the Hardin notes and mortgage to Whisler, the foreclosure proceedings of Stice v. Stice, the successive redemption by appellees of the premises from foreclosure, the claims of the complainant and the defenses of the defendants were fully and properly set out.

Upon the coming in of the Master's report, which was favorable to the complainant herein, the court sustained exceptions thereto and entered a decree dismissing the bill.

A number of questions have been exceedingly well presented by counsel for the respective parties in this behalf, but on account of the view we take of the case, it will not be necessary to discuss all of them. The gravamen of appellee's claim is that Whisler is bound by the decree in Stice v. Stice, holding that the so-called Hardin mortgage was a junior lien to the J.D. Stice mortgage; that under said decree Whisler had the right of redemption, which he failed to exercise; that his mortgage became merged in the decree in Stice v. Stice; that by reason of their redemptions they

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stand in the position of innocent purchasers without notice, and that this is a collateral attack on the decree in *Stice v. Stice*.

While there was nothing in the recitals of the mortgage to show that one had priority over the other, the surrounding facts and circumstances settle, beyond doubt, that it was the understanding among the parties that the Hardin mortgage should have priority over the J.D. Stice mortgage. Everyone concerned, even to J.D. Stice himself, asserts such was the understanding. It is competent for the parties to fix the priority of liens among themselves, even where the notes and mortgages are silent upon that subject. *Jackson v. Grosser* 278 Ill. 494. As a general proposition and in the absence of counter-vening equities, priority of mortgages as between persons claiming liens on the same property, depends on the respective dates when they were filed for record. *Jones, et al, v. Jones* 16 Ill. 117; *Huebsch v. Scheel* 81 Ill. 281. Just what brought about the finding in the decree in *Stice v. Stice* that the Hardin mortgage was subsequent to the other mortgage is not clear to us. Broad and insinuating imputations of collusion are made by counsel for complainant, although there is no direct charge made nor was there any issue framed to present such a question. But it is conceded that Stice, at all times, knew and understood that his mortgage was second to the Hardin mortgage, not only by agreement of parties, but from priority of recordation; that Hardin had assigned the notes and mortgage to Whisler; that Whisler was the owner and holder of them and that Hardin had no interest whatever in the premises or the subject matter at the time of the filing of the first proceedings for foreclosure. J.D. Stice testified to these facts in this proceeding and yet he failed to make Whisler a party defendant. He made no reference in his bill directly or indirectly to the Hardin mortgage or to the claim of Whisler to a lien on the mortgaged

and that this is a serious matter. It is not a matter of
minor importance. It is a matter of great importance.

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—continued from page 10—

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED.

There are no other persons who have been in contact with the subject since the time of the arrest. The subject has been in contact with the following persons since the time of the arrest:

[illegible]

premises. Whether the report of the master or the decree of foreclosure in that case was based upon any evidence offered therein, we are not advised, and so far as the decree in *Stice v. Stice* is concerned, it makes little difference, for it was entered pro confesso as to Hardin and it may be that the general allegation and prayer for relief above referred to would support the decree against him. *Kehm v. Mott* 187 Ill. 519; *Rohrhof v. Schmidt*, 218 Ill. 585. But upon this point we express no opinion further than to say that in *Kehm v. Mott* it was held that the defendant, who had appeared and expressly denied having any interest, was in no position to question the decree, and in *Rohrhof v. Schmidt*, the bill alleged that the defendant claimed to have some interest in the premises, the nature of which was unknown to complainant. There was no such allegation in the *Stice* case, even as to Hardin, and as we have said, there was no allegation whatever relative to Whisler. *Foval v. Benton* 48 Ill. App. 638 presents a case in which the facts are much the same as those in the present case, and where the general allegation of defendant's interest did not disclaim knowledge on the part of the complainant of its nature. It was there held that under such a general allegation, the defendant was not bound to set up her prior encumbrance, and her rights in respect thereto were not effected by the decree. We have said this much upon this question only because it is so strenuously insisted that Hardin was bound by the decree. We are not called upon to decide whether he was or not, but there can be no doubt that it is a better practice for the complainant, in a bill to foreclose, to make his allegations specific, when he seeks to challenge a prior lien. If the allegations in the bill were not sufficient to call for an answer from a party defendant, it is obvious that no one claiming under or through such defendant could be effected by the decree.

Whether the report of the master or the decree of
foreclosure in that case was based upon any evidence obtained
therein, we are not advised, and as far as the decree in this
v. Stone is concerned, it makes little difference, for it was

entered pro confesso as to the debt and it may be that the
general allegation and prayer for relief were referred to
would support the decree against him. Kahn v. Kahn 111 Ill.
513; Hornor v. Hornor, 228 Ill. 521. But upon this point
we express no opinion further than to say that in Kahn v. Kahn
it was held that the defendant, who had appeared and expressly

denied having any interest, was in no position to question
the decree, and in Hornor v. Hornor, the bill alleged that
the defendant claimed to have some interest in the premises,
the nature of which was unknown to complainant. There was no
such allegation in the Stone case, even as to Kahn, and
as we have said, there was no allegation whatever relative

to Whistler. Royal v. Weston 43 Ill. App. 628 presents a
case in which the facts are much the same as those in the
present case, and where the general allegation of defendant's
interest did not disclose knowledge on the part of the
complainant of its nature. It was there held that such was

a general allegation, the defendant was not bound to set up
her prior encumbrance, and her rights in respect thereto were
not affected by the decree. We have said this upon this
question only because it is no affirmatively insisted that
Kahn was bound by the decree. We are not advised upon so

decide whether he was or not, but there can be no doubt that
it is a better practice for the complainant, in a bill so
framed, to make his allegations specific, upon the merits
to challenge a prior lien. If the allegations in the bill
were not sufficient to call for an answer from a party

We have given notice to this proposition merely because of its bearing upon the alleged relation of Whisler to that decree.

It is suggested that appellees have pooled their interests and that the successive redemptions made by them were manipulated so that no more money was contributed by the pool than was sufficient to pay the mortgaged indebtedness due Stice, together with costs. Even though this be true, no wrong was committed so far as Whisler is concerned. Whether it effected the rights of other judgment creditors is a matter of no moment in this case.

Upon what ground counsel for appellee base their contention that Whisler had a right of redemption, we are unable to perceive, unless it is, that under the Stice decree Hardin was given that right. It will be remembered that said decree found Hardin to be the owner and holder of the three notes and mortgage. So far as the record in the Stice case is concerned, Whisler appears to be a total stranger to it. As the holder of said notes and mortgage, the indebtedness to him was not due until 1925, unless he elected to sooner declare it due because of some default of the mortgagor.

In order to ascertain if Whisler is bound by the decree in Stice v. Stice, and if his mortgage became merged therein and constituted a junior lien, it must be determined whether or not that decree is res adjudicata and binding as to Whisler. In proceedings to foreclose a mortgage, parties are either necessary or proper. Necessary parties are those who must be before the court before any valid or effectual decree can be entered. Proper parties are those who are so connected with the subject matter that their presence on the record cannot be objected to, as a misjoinder, although a full and complete decree might still be entered without considering or effecting their rights.

It is given notice to this proposition every person of
the feeling upon the subject of which is that
It is suggested that a person have paid their interest
and that the executive committee have by them were
indicated to that no more money was collected by the
them was sufficient to pay the mortgage interest and
notice, together with their. They think this is true, and
would be satisfied to let it stand as a matter. Further
it respects the rights of other persons involved in a matter
of no moment in this case.

Upon what ground would the committee have their
action that would be a right of collection, we are unable
to perceive, unless it is, that under the title
action was in fact right. It will be remembered that said
action would result to be the same as holder of the note
notes and mortgage. So far as the record in the title case
is concerned, which appears to be a total stranger to it.
as the holder of said note and mortgage, the indebtedness
to him and the note itself, unless he elected to assign
therein it was because of some defect of the mortgage.
In order to ascertain if there is any by the same
in case v. title, and if the mortgage became merged therein
and constituted a mortgage, it was to be determined whether
or not that action is not sufficient and binding on the matter.
In proceedings to foreclose a mortgage, notice was given
necessarily or proper. Necessary parties are those who must be
before the court before any sale of the mortgaged premises can be
entered. Further parties are those who are connected with
the subject matter that their presence in the record would
be objected to, as witnesses, although a bill and complaint

8.

Dowe v. Seely 29 Ill. 495.

In the strictest sense the only necessary parties, to a foreclosure proceedings, are the mortgagee, the mortgagor, and those who have acquired an interest in the premises subsequent to the mortgage. By the term "mortgagee" is meant not only the mortgagee of record, but also the real owner of the debt and all persons, who are entitled to share in it. 27 Cyc. 1562. This rule, of course, would not apply in cases where the beneficiaries are so numerous that it would not be practicable to join them all. Senior mortgagees and holders of prior encumbrances are not necessary parties; and if not joined as parties, their rights are in no way effected by the decree. Thus, it will be seen that, unless Whisler is bound by the decree against Hardin in Stice v. Stice, he need not take any notice of such decree because his interests would not be effected by it. If he was a prior encumbrancer, he was not a necessary party and his interests in the premises could not be foreclosed or barred. If he was a junior encumbrancer he was not made a party as he should have been and is not precluded from asserting his rights. Therefore it is now necessary to inquire whether Whisler was bound by the Stice decree because his assignor Hardin was a defendant therein. There is nothing in the statute or in the settled rules governing foreclosure proceedings, that requires the interest or title of a necessary party to be a matter of record. Tenants in possession usually have nothing of record to show, their claim of interest. Their possession is notice of their claim and they are indispensable parties. Assignees of junior mortgages and holders of notes secured by such mortgages, when known, are necessary parties and if a cause proceeds without them, they are not bound by the decree, and their rights are

Howe v. Doyle 22 Ill. 206.

In the earliest cases the only necessary parties, in a foreclosure proceeding, are the mortgagee, the mortgagor, and those who have acquired an interest in the premises subsequent to the mortgage. By the same "provision" it is held not only the mortgagee of record, but also the bona fide holder of the debt and all persons, who are entitled to share in it. 22 Cyc. 1282. This rule, of course, would not apply in cases where the beneficiaries are so numerous that it would not be practicable to join them all. Senior mortgagees and holders of prior encumbrances are not necessary parties; and it was joined as parties, their rights are in no way affected by the decree. Thus, it will be seen that, unless either is joined by the decree against him in title v. state, he need not take any notice of such decree because his interest would not be affected by it. If he was a prior encumbrancer, he was not a necessary party and his interest in the premises could not be foreclosed or barred. If he was a junior encumbrancer he was not made a party as he should have been and is not prejudiced there according to his rights. Therefore it is now necessary to inquire whether either was bound by the decree because he was a necessary party and his interest in the premises was a foreclosed debt. There is nothing in the statute as in the earlier cases governing foreclosure proceedings, that requires the inclusion of a necessary party to be a matter of course. That in foreclosure cases being held at court is not their claim of interest. Their possession is in title of their claim and they are indispensable parties. And since it is not necessary that all parties be joined by such decrees, those known, and necessary parties and all other persons who

9.
not deemed adjudicated. In this case J.D. Stice had full knowledge of the claim of Whisler and if he intended to attack the priority of Whisler's lien, then Whisler was an indispensable party and having been omitted, he was at liberty to ignore the decree.

But it is insisted that the decree against Hardin, who appeared of record to be the holder of the notes and mortgage, has the same effect in relation to said notes and mortgage as though Whisler had been made a party, and the decree had been rendered against him. To make a proper analysis of the subject, let us first inquire what title or interest J.D. Stice acquired by reason of the foreclosure proceedings. When the decree was rendered, his note and mortgage were merged therein and he became the holder of a certificate of foreclosure. Now suppose there had been no judgment creditors, and while Stice was still the holder of the certificate, Whisler had instituted proceedings to foreclose his mortgage. Could it be said that Whisler could have no relief, because Stice had procured a decree in a cause in which he had purposely and intentionally omitted to make a party defendant of Whisler, whom he knew to be the owner of the three notes and mortgage above mentioned? Certainly not. There can be little doubt about the defective title obtained by Stice as against Whisler.

On the last day allowed for redemptions, the appellees made their successive redemptions leaving Sadie A. Sampson, Administratrix of the estate of Sarah A. Sampson, deceased, the last redeeming creditor. It is now contended that she and the other creditors, who redeemed, occupy a position analogous to that of innocent purchasers. The authorities are against such a contention. Where a redemption is effected by a judgment creditor, he succeeds to the position and all the rights of the foreclosure purchaser; or according to some of the decisions by a species of subrogation to the position and rights of the mortgagee whom he redeems. 27 Cyc. 1866.

In Jackson v. Grosser 218 Ill. on page 498 of the opinion, the rule is stated to be that when one redeems from a ~~foreclosure sale~~ ^{foreclosure sale} ~~foreclosure sale~~ he acquires the rights of the purchaser under the sale and no more. This rule seems to be universal. Herdman v. Cooper 138 Ill. 583; Smith v. Mace 137 Ill. 68 and cases cited. Applying it to this situation, we conclude that the redeeming creditors took their title by redemption, subject to all of the defects in the title held by J.D. Stice, under his foreclosure decree. And proceeding a step further, we observe that inasmuch as his title was defective, because he deliberately failed to give the court jurisdiction of Whisler, so also is the title of the redeeming creditors. And again, since Whisler is not barred from foreclosing his mortgage, because of any supposed rights obtained by Stice through his foreclosure proceedings, he is not barred from foreclosing it because of the supposed rights which the judgment creditors derived under and through J.D. Stice.

The foreclosure proceedings herein is in no sense a collateral attack upon the decree in Stice v. Stice. So far as the parties to that suit are concerned, the decree is a finality. The suit instituted by Whisler is no more of an attack, collateral or otherwise, upon the decree in Stice v. Stice, than it would have been if the complainant in the Stice case had alleged, and the decree found, that the Whisler mortgage was a prior lien, and that he had not been made a party to the proceedings. If such were the situation, no one would deny the right of Whisler to maintain this suit. Of course, if Whisler had been made a party to the Stice suit and a decree had been entered holding that his mortgage was a second mortgage, he could not be heard to deny the truth of the finding in a subsequent suit. But that is not the case before us, for Whisler was not made a party. If he was the holder of a prior mortgage and was not made a party to the suit,

the title is stated to be first taken from a
the rights of the plaintiff
under the title and no more. This title seems to be universal.
William v. Cooper 125 Ill. 223; Miller v. State 125 Ill. 223
cases cited. Applying it to this situation, we conclude that
the releasing creditors took their title by assignment, and
lost to all of the defects in the title held by T. E. Miller,
under his Torrensman license. And proceeding a step further,
we observe that likewise as his title was defective, because
he deliberately failed to give the correct indication of
Miller, we also in the title of the releasing creditors. And
again, since Miller is not barred from foreclosing his
mortgage, because of any supposed rights obtained by Miller
through his Torrensman proceeding, he is not barred from
foreclosing it because of the supposed rights which the fore-
closing creditors derived under and through T. E. Miller.
The Torrensman proceeding herein is in no manner a
collateral attack upon the decree in Miller v. Miller. As far
as the parties to that suit are concerned, the decree is a
finality. The suit instituted by Miller is no more so as
against, collateral or otherwise, upon the decree in Miller v.
Miller, than it would have been if the complaint in the Miller
case had alleged, and the decree found, that the Miller
mortgage was a prior lien, and that he had not been paid a
part of the proceeds. It had been the situation, as we
would keep the right of Miller to maintain this suit. Of
course, if Miller had been made a party to the Miller suit and
a decree had been entered holding that his mortgage was a
second mortgage, he could not be heard to keep the first of
the finding in a subsequent suit. But that is not the case.

filed by Stice. It made no difference to him whether the decree was properly or improperly obtained, or whether it was erroneous or otherwise. His rights were not imperiled by the suit, and he was at liberty to assert them against every party to that suit, no matter what their interest may have been or how acquired.

No authority is cited in support of appellee's contention that a decree against a mortgagee, who has assigned his mortgage, is in all cases sufficient to bind the assignee and we do not hesitate to venture the opinion that no such authority can be found. Many cases can be found holding that a complainant in a foreclosure proceeding need not make the holders of notes or bonds parties where they are represented by a trustee and are so numerous that it would be impractical to make the individual holders parties defendant. However, it is an invariable rule that a complainant must make one a party defendant who is claiming priority but whose mortgage the complainant seeks to have declared a junior lien; and this is especially so when the complainant knows the identity of such person. *Wellington V. Heermans* 110 Ill. 564; *Woolner v. Wilson* 5 Ill. App. 439. The undisputed evidence shows that Whisler was the owner and holder of the first mortgage; that J.D. Stice knew it and that Whisler was not made a party to the Stice foreclosure suit. Under these circumstances his claims were not adjudicated and his right to foreclose was not lost. He is entitled to his day in court. The decree in this cause is therefore reversed and the cause remanded with directions to the Chancellor to enter a decree of foreclosure in favor of the appellant herein and for such other proceedings as may be necessary to carry out the views expressed in this opinion.

Decree reversed and remanded with directions.

...by virtue of its position as the holder of the
the source was properly or improperly obtained, or whether
it was obtained or obtained. His rights were not impaired
by the fact, and he was at liberty to exercise them against every
party to that suit, no matter what their interest may have been
in the property.

The majority is cited in support of appellant's
position that a decree against a mortgagee, who has assigned
his mortgage, is in all cases entitled to bind the assignee
and so to not hesitate to venture the opinion that no such
objection can be taken. That, unless one be found who has
acquired the mortgage by a fraudulent assignment and not with the
intent of making or doing better than they are represented
to be, and one so acquired that it would be immaterial
to make the individual holder's parties defendant. However,
it is an inviolable rule that a complaint must state and
show that the one is claiming priority and when mortgage
the complaint seeks to have declared a junior lien and this
is especially so when the complaint makes the identity of such
persons. Callahan v. Westman, 111 Ill. 2d; Fisher v. Fisher
111 Ill. 2d. The defendant's answer shows that Callahan
was the owner and holder of the first mortgage; that he
then made it and that Callahan was not made a party to the
first foreclosure suit. What facts distinguished his claim
was not alleged and his right to foreclose was not lost.
It is entitled to his lien in equity. The decree in this case
is entirely correct and the same remains with division
of the court. It is a decree of foreclosure in favor of
the mortgagee herein and the same is correct in law and
equity to deny the first mortgage in this opinion.
The court and remain with division.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

*Rehearing denied October 16, 1925.
Abstract only.*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 639'

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Agenda No. 56

General No. 7435

Lillie L. Sturges,

appellee,

vs.

Appeal from Du Page County

Tina Huster, et al,

appellants,

238 I.A. 39

Jones, P. J.

This is an appeal from a decree of foreclosure and sale. The appellee, Lillie L. Sturges, was the owner of certain real estate in Elmhurst, Du Page County, Illinois. She was making her home, at least temporarily, in California. She had given her son, Lee Sturges, a power of attorney authorizing him to sell and convey the said Elmhurst property and any and all other real estate owned by her in the State of Illinois. He was given unlimited authority to sell at such price and upon such terms as he thought fit and convenient. This power of attorney was executed on the 28th day of June, 1921. Negotiations for the sale of the Elmhurst real estate were then carried on between Lee Sturges and one John A. Bickford, who was representing Tina Huster and also certain other parties, interested in the Elmhurst Real Estate Improvement Company. On July 10th, 1921, Lee Sturges caused his mother to execute a warranty deed to Tina Huster. However, it was not acknowledged until the first ~~of~~ day of August, 1921. The deed contained the following covenant: "All taxes levied or assessed against property subsequent to the year 1920 and all unpaid special assessments and unpaid installments of special assessments heretofore levied and assessed and now standing against said premises, or any part thereof, all of which the grantee assumes and agrees to pay." The sale of the land to Tina Huster was not consummated until sometime in October, 1921. Prior to the consummation of the sale, but subsequent to the execution of the deed, to-wit; on August 3rd, 1921, a contract of sale, known in this suit as "Exhibit A"

Illie L. Sturges,

appellee,

Appeal from Du Page County

vs.

Tina Huster, et al,

appellants,

238 T.A. 39

Jones, P. J.

This is an appeal from a decree of foreclosure and sale.

The appellee, Illie L. Sturges, was the owner of certain real estate in Winnetka, Du Page County, Illinois. She was making her home, at least temporarily, in California. She had given her son, Lee Sturges, a power of attorney authorizing him to sell and convey the said Winnetka property and any and all other real estate owned by her in the State of Illinois. He was given unlimited authority to sell at such price and upon such terms as he thought fit and convenient. This power of attorney was executed on the 28th day of June, 1921. Negotiations for the sale of the Winnetka real estate were then carried on between Lee Sturges and one John A. Bickford, who was representing Tina Huster and also certain other parties, interested in the Winnetka Real Estate Improvement Company. On July 10th, 1921, Lee Sturges caused his mother to execute a warranty deed to Tina Huster. However, it was not recorded until the first day of August, 1921. The deed contained the following covenant: "All taxes levied or assessed against property subsequent to the year 1920 and all unpaid special assessments and unpaid installments of special assessments heretofore levied and assessed and now standing against said premises, or any part thereof, all of which the grantee assumes and agrees to pay." The sale of the land to Tina Huster was not consummated until

was entered into between Lee Sturges and the said Bickford, whereby the said Sturges agreed to sell and cause to be conveyed to Tina Huster, the parcels of land mentioned in said deed for and in consideration of \$85,000 in the following manner:-

\$30,000 on delivery of the deed, and the balance in deferred payments evidenced by two promissory notes, one for \$10,000 and the other for \$45,000. These notes were to be secured by the deed of trust, which is involved in this litigation. The contract was drawn by an attorney for Sturges, and clause four thereof as originally drafted provided: "It is understood between the parties hereto that the general state and county taxes for the year 1921 are to be pro-rated between the parties as of the date of the delivery of the deed, the party of the first part accounting to the party of the second part for said general state and county taxes for 1921, up to the date of delivery of deed; and it is further understood between the parties that installments of special assessments heretofore levied or assessed and now standing against said premises or any part thereof that are past due, have been paid." Bickford objected to this provision, because it did not contemplate a pro rating of unpaid installments of special assessments, which were due and payable for the year 1921, and thereupon by mutual agreement the following interlineation was made with pen, immediately after the figures 1921, "and all unpaid installments of special assessments due and payable for 1921." The transaction ran along until about October 12th, 1921, when the parties appeared ready to conclude it. They met at the office of the attorney for Sturges, and the question of taxes and special assessments was again talked over. According to the testimony of Sturges, he stated that he did not want to be bothered by making a subsequent settlement concerning these items. He produced a receipt for general taxes of the preceding year showing the total amount due in that year to be about \$1850.

was entered into between Lee Harvey and his wife Elizabeth, whereby the said Harvey agreed to sell and convey to be conveyed to Tina Hunter, the spouse of Jack Hunter in said deed for and in consideration of \$25,000 in the following manner:-

\$20,000 on delivery of the deed, and the balance in delivery payments evidenced by two promissory notes, one for \$10,000 and the other for \$10,000. These notes were to be secured by the deed of trust, which is involved in this litigation. The same trust was given by an attorney for Harvey, and clause four hereof as originally drafted provided: "It is understood between the parties hereto that the general state and county taxes for the year 1981 are to be paid between the parties as of the date of the delivery of the deed, the party of the first part accounting to the party of the second part the said general state and county taxes for 1981, up to the date of delivery of deed; and it is further understood between the parties that installment payments of special assessments heretofore levied or assessed and now standing against said premises or any part thereof shall not be paid, have been paid." Elizabeth objected to this provision, because it did not contemplate a pro rating of unpaid installments of special assessments, which were due and payable for the year 1981, and thereupon by mutual agreement the following limitation was made with her, immediately after the clause 1981, "and all unpaid installments of special assessments due and payable for 1981." The reservation was made with said clause 1981, 1981, when the parties appeared ready to execute it. They met at the office of the attorney for Harvey, and the question of taxes and special assessments was again raised over. According to the testimony of Harvey, he stated that in all his years to be followed by making a subsequent affidavit concerning these items. He was not a resident for several years of the residence

Someone suggested that the general taxes for 1921 would be a greater amount, and then he asserts, he offered to allow a credit of \$2000 upon the cash payment agreed on, in full settlement of the requirement of the contract concerning the pro rating of taxes and special assessments. He further testified that this proposition was accepted by Bickford and that he allowed the said credit. Bickford, however, contradicted Sturges and stated in his testimony that no bills for special assessments were before the parties at the time of their conversation; that it was impossible at that time to know what the taxes and special assessments would amount to and for the purpose of closing the deal, Sturges proposed and he, Bickford, assented, that a credit of \$2000 would be made upon the cash payment due and if it turned out that the apportionment should be any more or less, it would be adjusted later when the exact amount was determined. Sturges and Bickford were the only witnesses who testified concerning this matter.

Interest was due and payable on said notes semi-annually, to-wit; on January 10th, and July 10th, of each year during the life of the notes. On the first interest paying date in 1922, neither the general taxes nor the installments of special assessments for 1921 had been paid, and the record does not disclose that anything was said by either party, when the interest was paid in January, about taxes and assessments. Later, when appellants had paid such taxes and assessments, it was found that the total amount was \$5424.89 and if the same were pro rated according to appellant's contention, as of October 21, 1921, the amount due from appellee to appellants would be \$4255.38, subject to said credit of \$2000, leaving a balance due appellants of \$2255.38. When interest was due in July, 1922 appellants failed to pay it and appellee made repeated demand for it and on January 4th, 1923, six days before the next interest paying date, the bill for foreclosure herein was filed, under a provision of the trust deed authorizing it, in case of a failure to pay interest within thirty

Someone suggested that the general taxes for 1921 would be a greater amount, and then he asserts, he offered to allow a credit of \$2000 upon the cash payment agreed on, in full settlement of the requirement of the contract concerning the paying of taxes and special assessments. He further testified that this proposition was accepted by Bickford and that he allowed the said credit. Bickford, however, contradicted Sturges and stated in his testimony that no bills for special assessments were before the parties at the time of their conversation; that it was impossible at that time to know what the taxes and special assessments would amount to and for the purpose of closing the deal, Sturges proposed and he, Bickford, assented, that a credit of \$2000 would be made upon the cash payment due and if it turned out that the apportionment should be any more or less, it would be adjusted later when the exact amount was determined. Sturges and Bickford were the only witnesses who testified concerning this matter.

Interest was due and payable on said notes semi-annually, to-wit: on January 10th, and July 10th, of each year during the life of the notes. On the first interest paying date in 1922, neither the general taxes nor the installments of special assessments for 1921 had been paid, and the record does not disclose that anything was said by either party, when the interest was paid in January, about taxes and assessments. Later, when appellants had paid such taxes and assessments, it was found that the total amount was \$5484.89 and if the same were pro rated according to appellant's contention, as of October 31, 1921, the amount due from appellee to appellants would be \$4255.58, subject to said credit of \$2000, leaving a balance due appellants of \$2255.58. When interest was due in July, 1922 appellants failed to pay it and appellee made repeated demand for it and on January 4th, 1923, six days before the next interest paying date, the bill for four-

days from the date it became due.

Bickford testified that he told Sturges there was nothing due as interest; that the amount of interest accrued was \$1650, but that appellants were entitled to a credit of \$2255.38, which should be taken care of in a settlement between the parties. Sturges denies this testimony and insists that no claim for any amount due under the pro rata provision of the contract was ever mentioned by any of the appellants, until after these proceedings were instituted. The Master took and reported the evidence together with his conclusions of fact and law. He made no specific finding as to whether or not the \$2000 credit was allowed as a full settlement of the provision for pro rating general taxes and special assessments, but found as a matter of law that all the terms and provisions of the contract of purchase were merged in those of the deed, and that inasmuch as the deed covenanted that the grantee assumed and agreed to pay the taxes and special assessments, there was nothing due appellants and therefore they were in default in the payment of interest, and that appellee was entitled to a decree for foreclosure and sale. The Master's report, together with his conclusions was approved and the decree herein entered.

Because of the inadequacy of the abstract in this case, we have had a very considerable amount of unnecessary labor to perform. In order to reach a conclusion we have been required to make repeated examinations of the record, for the reason that not one of the numerous and important exhibits was abstracted. We were furnished but a mere index of the exhibits. Among the questions raised, several are of little merit or relevancy. Conveyances to other parties, side-agreements concerning other lands and buildings appear to us as to be wholly immaterial to the issues involved in this case. The bill alleged as a cause for declaring the entire indebtedness due and payable that appellants had breached (1) the covenant to pay interest, and (2) the covenant to keep the buildings

days from the date it became due.

Nichols testified that he told Sturges that he was holding

due an interest; that the amount of interest earned was \$16.00, but that appellants were entitled to a credit of \$118.35, which

should be taken care of in a settlement between the parties.

Sturges denies this testimony and insists that he paid the money

amount due under the pro rata provision of the contract was even mentioned by any of the appellants, until after these proceedings

were instituted. The master took and reported the evidence to-

gether with his conclusions of fact and law. He made no specific

finding as to whether or not the \$3000 credit was allowed as a

full settlement of the provision for pro rating general terms

and special assessments, but found as a matter of law that all

the terms and provisions of the contract of purchase were complied

in those of the deed, and that inasmuch as the deed contained

that the grantees assumed and agreed to pay the taxes and special

assessments, there was nothing due appellants and therefore they

were in default in the payment of interest, and that appellee was

entitled to a decree for foreclosure and sale. The master's

report, together with his conclusions was approved and the decree

herein entered.

Because of the inadequacy of the abstract in this case, we

have had a very considerable amount of unnecessary labor to perform.

In order to reach a conclusion we have been required to make re-

peated examinations of the record, for the reason that not one of

the numerous and important exhibits was identified. We were furnished

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several are of little merit or relevancy. Consequently in order

rather, the-forements concerning other lands and buildings

appear to us as to be wholly immaterial to the issues involved in

insured, with loss, if any, payable to the holders of the notes. The evidence showed beyond any doubt that appellants had kept the buildings insured and that there was no breach of covenant in that particular, so that, the only breach finally relied upon by appellee pertains to the alleged nonpayment of interest due on July 10th, 1922.

According to the finding of the Master and the decree of the Chancellor, the terms of the contract of purchase became merged in those of the deed upon the delivery of said deed. If such conclusion is correct, then it makes no difference in the decision of this case what was the understanding between the parties, with respect to the \$2000 credit. If, on the other hand, such conclusion is incorrect, then it is of vital importance to this case to determine what the understanding was with reference to such credit.

Generally, the execution and acceptance of a deed extinguishes the contract for purchase and the contract is said to be merged in the deed by performance. But this rule is only applicable where the conveyance of the property is the entire subject matter of the contract. Where the contract provides for something else, besides the mere conveyance of the property, then there is no merger of the terms concerning those additional requirements. Such terms remain in full force until the other acts have been performed. * Bierwer v. Mueller, 254 Ill. 315 and cases cited on page 322 of the opinion. Also 18 C.J. page 270, Sec. 231. Nor will a merger be deemed to have been effected where to give it such effect would operate against the intention of both parties. 13 C.J. 599 Sec. 618. With these rules of law in mind, it is now necessary to determine the intention of the parties. Authorities uniformly hold that where two instruments are executed at the same time or contemporaneously, to evidence the full intentions of the parties, both instruments should be read together and considered as one instrument. Grindell v. Grindell, 240 Ill. 143; Torrence v. Shad, 112 Ill. 466; Gould v. Magnolia Metal Co. 207 Ill. 172.

insured, with loss, if any, payable to the holders of the notes. The evidence showed beyond any doubt that appellants had kept the buildings insured and that there was no breach of covenant in that particular, so that, the only breach finally relied upon by appellee pertains to the alleged nonpayment of interest due on

July 10th, 1922.

According to the finding of the Master and the decree of the Chancellor, the terms of the contract of purchase became merged in those of the deed upon the delivery of said deed. In such a conclusion is correct, then it makes no difference in the decision of this case what was the understanding between the parties, with respect to the \$2000 credit. If, on the other hand, such conclusion is incorrect, then it is of vital importance to this case to determine what the understanding was with reference to such credit. Generally, the execution and acceptance of a deed extinguishes the contract for purchase and the contract is said to be merged in the deed by performance. But this rule is only applicable where the conveyance of the property is the entire subject matter of the contract. Where the contract provides for something else, besides the mere conveyance of the property, then there is no merger of the terms concerning those additional requirements. Such terms remain in full force until the other acts have been performed. *Sturges v. Mueller*, 224 Ill. 515 and cases cited on page 222 of the opinion. Also 18 C.L. page 270, Sec. 231. Nor will a merger be deemed to have been effected where to give it such effect would operate against the intention of both parties. 13 C.L. 229 Sec. 218. With these rules of law in mind, it is now necessary to determine the intention of the parties. Authorities uniformly hold that where two instruments are executed at the same time or contemporaneously, to evidence the full intentions of the parties, the instruments should be read together and considered as one instrument.

It seems to us that there is little room to doubt that the parties intended that the total amount paid by appellants on account of general taxes and special assessments for the year 1921 should be pro rated between appellee and appellants as of the date of the deed, October 21st, 1921. It must be borne in mind that in this case the contract of [✓]purchase known as "Exhibit A" was executed subsequent to the signing and acknowledgment of the deed and before its delivery. Appellee's son, her attorney in fact, for reasons satisfactory to himself caused the deed to be executed and acknowledged before he had entered into a contract with appellants. When it came time for the execution of such contract, Bickford objected to the provisions of the deed which required the grantee to assume and agree to pay all of such taxes and assessments. He also objected to the contract of purchase, which had been prepared by the attorney for Sturges, because of its provision concerning the payment of such taxes and assessments, and he compelled the insertion of a provision for the pro rating of installments of special assessments for 1921 as well as of the general taxes. Nothing is better established in the entire case than his determination to have such a provision and that appellee acquiesced in it. If Bickford had demanded the insertion of the provision in the deed, it would have been necessary to return the deed to California. Such a course was entirely unnecessary. Lee Sturges held a power of attorney fully authorizing him to make sale of the premises upon such terms and conditions as he saw fit. He had the power to agree to apportion the taxes and assessments, and it was entirely consistent with good business conduct to provide for a division of them, and it was done by a separate and special agreement. This having been accomplished, what reason can be found for even suspecting that the appellants would thereafter abandon their purpose to have these tax charges apportioned.

The word "year" when used in reference to taxes of or for a year shall mean a calendar year beginning on the first day of

It seems to me that there is little more to be said than the parties intended that the total amount said by the parties on account of general taxes and special assessments for the year 1921 should be pro rated between the parties and withheld as of the date of the deed, October 21st, 1921. It may be noted in this that in this case the contract of purchase known as "Exhibit A" was executed subsequent to the signing and acknowledgment of the deed and before its delivery. The parties' son, per abiding in fact, for reasons satisfactory to himself caused the deed to be executed and acknowledged before he had entered into a contract with the parties. When it came time for the execution of such deed, the parties objected to the provisions of the deed which required the grantee to assume and agree to pay all of such taxes and assessments. He also objected to the contract of purchase, which had been prepared by the attorney for the parties, because of the provision concerning the payment of such taxes and assessments, and he compelled the insertion of a provision for the pro rating of the assessments of special assessments for 1921 as well as of the general taxes. Nothing is better established in the entire case than his determination to have such a provision and that objection was witnessed in it. If Dickford had demanded the insertion of the provision in the deed, it would have been necessary to return the deed to California. Such a course was entirely unnecessary. The parties held a power of attorney fully authorizing him to make sale of the premises upon such terms and conditions as he saw fit. He had the power to agree to execute the taxes and assessments, and it was entirely consistent with good business practice to provide for a division of them, and it was true by a separate and special agreement. This having been accomplished, what reason can be shown for even suggesting that the appellants would thereafter demand their money to have been paid after acknowledgment.

January. Chap. 120, Sec. 292, Smith-Hurd's Revised Statute; Thompson v. Crains, 294 Ill. 277. It will be observed that under the contract to pro rate the taxes and assessments, appellee would be compelled to account for almost ten-twelfths of the year. Appellants knew from an inspection of the general tax receipt that such taxes alone would amount to about the sum of the credit upon the cash payment, and it is not likely that they would intentionally waive the right to have the special assessments apportioned, particularly when they amounted to more than \$2600. It later turned out that the general taxes were almost \$1000 more than the year before. There is no consideration or basis to support a belief that the appellants intended that the contract of purchase should be terminated by a merger with the deed. There is no reasonable foundation for the contention of appellant that all the conditions of the contract were performed in October, 1921, and that the contract was fully executed and merged in the deed. Suppose the subject of making a cash credit had never been mentioned on October 12th, and appellants had paid the full amount of the cash payment, would it be said that the contract for a pro rata apportionment was merged in the provision of the deed and appellants were not entitled to contribution either upon general taxes or special assessments? Such a contention would be obviously unconscionable. If it were maintained, it would result in a loss of nearly \$5000 to appellants without a particle of consideration passing to them. We cannot escape the conclusion that every principle of equity demands that the two instruments be considered together as one; and that the doctrine of merger has no application to the present case. The deed provided that the grantee should pay all taxes and assessments, including the general taxes for 1921. Hence, the mere fact that a credit of \$2000 was allowed is apparently conclusive that the parties did not intend that the payment of taxes was to be settled according to the terms of the deed. The conclusion seems irresistible that they intended that

January. Chap. 180, Sec. 122, said that the State of
 Thompson v. Crane, 234 Ill. 277. It will be observed that under
 the contract to pay the taxes and assessments, appellee would
 be compelled to account for almost the entire of the year.
 Appellant knew from an inspection of the general tax returns
 that such taxes alone would amount to about the sum of the credit
 upon the cash payment, and it is not likely that they would in-
 tentually waive the right to have the special assessments
 apportioned, particularly when they amounted to more than \$1000.
 It later turned out that the general taxes were almost \$1000 more
 than the year before. There is no consideration or basis for
 support a belief that the appellant intended that the contract of
 purchase should be terminated by a merger with the deed. There
 is no reasonable foundation for the contention of appellant that
 all the conditions of the contract were performed in October, 1921,
 and that the contract was fully executed and merged in the deed.
 Suppose the subject of making a cash credit had never been mention-
 ed on October 15th, and appellant had paid the full amount of the
 cash payment, would it be said that the contract for a pro rata
 apportionment was merged in the provision of the deed and appor-
 tionment was entitled to contribution either upon general taxes
 or special assessments? Was a contribution would be obviously
 unworkable. If it were maintained, it would result in a loss
 of nearly \$3000 to appellant without a particle of consideration
 passing to them. We cannot escape the conclusion that every
 principle of equity demands that the two instruments be consid-
 ered together as one; and that the doctrine of merger has no appli-
 cation to the present case. The deed provided that the parties
 should pay all taxes and assessments, including the general taxes
 for 1921. Hence, the mere fact that a credit of \$3000 was allowed
 is apparently conclusive that the parties did not intend that the

they should be settled under the terms of the contract. This conclusion precludes the idea of a merger and also of the termination of the contract by performance.

It is further urged by counsel for appellee that the two instruments can not be read together as one, because the parties are not the same; that the parties to the deed are Lillie L. Sturges and Tina Huster, while those to the contract of purchase are Lee Sturges and John A. Bickford. It is true that the parties signatory to the different instruments are not the same but the actual parties are. The purchase and sale of the premises in question was the principal subject matter of both instruments. Lee Sturges was an agent acting on behalf of his mother, Lillie L. Sturges. Bickford was an agent acting for Tina Huster and those associated with her. The parties actual and nominal to both instruments were aware of the capacity in which each party acted. The identity of both principals and agents was fully disclosed; therefore the acts of the agents in this behalf were the acts of their principals. Where one is dealing with an agent whose principal is disclosed, the acts of the agent in the course of his employment and in the scope of his actual or apparent authority, are held to be the acts of the principal and bind the principal. *Pardridge v. LaPries*, 84 Ill. 51; *Marckle v. Haskins*, 27 Ill. 382; *McCormick Harvesting Machine Co. v. Snell*, 23 Ill. App. 79, *Savage v. Stewart*, 226 Ill. App. 388.

Having now determined that the provision of the contract for pro rating the taxes and special assessments was not merged in the terms of the deed, but constitute a binding agreement, we conclude from the force of the facts which lead us to such conclusion, that the credit of \$2000 was not made for the purpose of effecting a final and complete settlement of all liability for taxes and special assessments, but was a mere credit upon account, made for the purpose of the convenience of the parties, without altering

They should be settled under the terms of the contract. This
 condition provides the idea of a merger and also of the ter-
 mination of the contract by performance.

It is further urged by counsel for appellee that the two
 instruments can not be read together as one, because the parties
 are not the same; that the parties to the deed are Willie E.
 Sturges and Tina Hunter, while those to the contract of purchase
 are Lee Sturges and John A. Nicklars. It is true that the parties
 signatory to the different instruments are not the same but the
 actual parties are. The purchase was made of the premises in
 question was the principal subject matter of both instruments.
 Lee Sturges was an agent acting on behalf of his mother, Willie
 E. Sturges. Nicklars was an agent acting for Tina Hunter and those
 associated with her. The parties actual and nominal to both
 instruments were aware of the agency in which each party acted.
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 principal is disclosed, the acts of the agent in the exercise of
 his employment and in the scope of his actual or apparent authority,
 are held to be the acts of the principal and bind the principal.
Bradbridge v. Taylor, 94 Cal. 53; *Wentz v. Watkins*, 17 Ill. 209;
McDonnell Investing Machine Co. v. Smith, 88 Ill. App. 79; *Carver*
v. Newberry, 222 Ill. App. 323.

Having now determined that the provisions of the contract are
 not null and void and special assessments are not waived in the
 terms of the deed, and constitute a binding agreement, we conclude
 that the force of the facts which lead us to such conclusion, that
 the credit of \$2500 was not made for the purpose of releasing a
 claim and complete settlement of all liability for taxes and

their general liability under the terms of the contract. Even if the question were a doubtful one, the same conclusion would be reached because the covenants of a deed are always to be construed most strictly against the grantor. *Brenneman v. Dillon*, 296 Ill. 140; *Sharp v. Thompson*, 100 Ill. 447.

It therefore appears that at the time of the institution of this proceeding, there was considerably more due appellants under the pro rata tax provision of the contract, than there was due appellee for interest then payable. Appellants were undoubtedly entitled to set off their claim against the interest claim, and if this had been done no interest would have been due and payable at the time of the bringing of this action, and therefore, it was prematurely brought and cannot be maintained. Counsel for appellee argue that the decree ought to be sustained because interest and taxes, which subsequently became due and payable, were paid by appellee. Such contention cannot be sustained for the reason that this proceeding is predicated solely upon the alleged failure of appellants to pay the interest of July 10th, 1922, within thirty days thereafter, as well as the consequent election of appellee to declare the entire debt due because of such failure.

Complaint is also made of the fees allowed the Master in this behalf. They are:

| | |
|---|----------|
| Stenographer, taking and transcribing testimony - - - - - | \$183.00 |
| Master's fee for hearing - - - - - | \$500.00 |
| Recording Master's fee for hearing - - - | \$15.00 |
| Total - - - - - | \$698.00 |

In *Bierwer v. Mueller*, supra, the chancellor allowed the Master a fee of \$360 for examining the questions in issue and reporting his conclusions. This fee was based on a charge of \$5.00 per hour. The Master's report of testimony covered 930 pages of typewriting. The Supreme Court held that the fee was excessive, and modified the decree by reducing the fee to \$150. In the present case the testimony taken before the master is contained in 174 pages of typewriting. The Master's report of conclusions

their general liability under the terms of the contract. Even if the question were a doubtful one, the same conclusion would be reached because the covenants of a deed are always to be construed most strictly against the grantor. *Brenneman v. Dillon*, 236 Ill. 140; *Sharp v. Thompson*, 100 Ill. 447.

It therefore appears that at the time of the institution of this proceeding, there was considerably more due appellants under the pro rata tax provision of the contract, than there was due appellee for interest then payable. Appellants were undoubtedly entitled to set off their claim against the interest claim, and if this had been done no interest would have been due and payable at the time of the bringing of this action, and therefore, it was prematurely brought and cannot be maintained. Counsel for appellee argue that the decree ought to be sustained because interest and taxes, which subsequently became due and payable, were paid by appellee. Such contention cannot be sustained for the reason that this proceeding is predicated solely upon the alleged failure of appellants to pay the interest of July 10th, 1922, within thirty days thereafter, as well as the consequent election of appellee to declare the entire debt due because of such failure. Complaint is also made of the fees allowed the Master in this behalf. They are:

| | |
|---|-----------------|
| Stenographer, taking and transcribing testimony - - - - - | \$185.00 |
| Master's fee for hearing - - - - - | \$500.00 |
| Recording Master's fee for hearing - - - - - | \$18.00 |
| Total - - - - - | <u>\$693.00</u> |

In *Bierwer v. Mueller*, supra, the chancellor allowed the Master a fee of \$350 for examining the questions in issue and reporting his conclusions. This fee was based on a charge of \$2.00 per hour. The Master's report of testimony covered 230 pages of typewriting. The Supreme Court held that the fee was excessive, and modified the decree by reducing the fee to \$150. In the

of fact and law comprise 8 pages. He was allowed \$183 for stenographer's fees for taking and transcribing the evidence in addition to the \$500 allowed him as master's fee for hearing. There were but six witnesses sworn and examined. Only two of them testified to matters pertaining to the principal points of controversy. The time consumed in the hearing of the case and the consideration necessarily given to the questions involved do not warrant the allowance of so large a fee. We think that \$200 would be at least a liberal allowance; the same to include his statutory fees for taking and reporting the testimony with his conclusions.

This cause is reversed and remanded with directions to the chancellor to enter a decree modifying the allowance of Master's fees pursuant to the views herein expressed, and dismissing the bill at the costs of complainant.

Reversed and Remanded with Directions.

of fact and law occupies 8 pages. He was allowed \$100 for stenographic notes for taking and transcribing the evidence in addition to the \$500 allowed him as master of the hearing. There were but six witnesses sworn and examined. Only two of them testified to matters pertaining to the physical points of controversy. The time consumed in the hearing at the scene and the consideration necessarily given to the questions involved do not warrant the allowance of so large a fee. We think that \$500 would be at least a liberal allowance; the same to include his stenographic fees for taking and reporting the testimony at the examination.

This case is reviewed and remanded with directions to the examiner to enter a decree modifying the allowance of master's fees pursuant to the above herein expressed, and dissolving the bill as the matter of controversy.

Approved and awarded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

7451

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 639²

BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



Agenda No. 68

General No. 7451

First National Bank of Secor,
Illinois,

appellant,

vs.

Sylvester Stephens, et al,

appellee,

Appeal from Circuit Court
of Woodford County

238 I.A. 639

Jones, P. J.

This is an appeal from a judgment discharging a garnishee. The facts are: On December 29th, 1923, the First National Bank of Secor obtained a judgment against William H. Dixon and Sylvester Stephens for \$1282.13 and costs. Execution was issued thereon and returned "no property found." Thereafter an affidavit for garnishee summons was filed and process was issued against Jesse W. Moore. The said Moore answered the interrogatories propounded to him and stated that he was indebted to the said Sylvester Stephens in the sum of \$1216.30, but was not indebted in any amount to the said William H. Dixon; that his said indebtedness to Stephens was on account of a certain promissory note for the said amount due December 29th, 1923; that said date was the day upon which he was served with summons; that afterwards judgment on his said note was entered against him in the circuit court of Peoria County in favor of Emma Stephens who claimed to be the legal holder and owner thereof; that an execution was issued on said judgment and placed in the hands of the Sheriff of Woodford County who served it and threatened to make a levy thereon; that because of the situation he paid the amount due on said judgment and execution; that he is informed that under the law he was not subject to garnishment because of said indebtedness for the reason he was served with garnishee process on the date said note was due; and that said service of process upon him was premature and invalid.

First National Bank of Secor,

Illinois,

appellant,

Appeal from Circuit Court

of Woodford County

vs.

Sylvester Stephens, et al,

appellee,

238 I.A. 639

Jones, P. J.

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garnishee summons was filed and process was issued against Jesse

W. Moore. The said Moore answered the interrogatories propounded

to him and stated that he was indebted to the said Sylvester

Stephens in the sum of \$1216.30, but was not indebted in any

amount to the said William H. Dixon; that his said indebtedness

to Stephens was on account of a certain promissory note for the

said amount due December 29th, 1923; that said date was the day

upon which he was served with summons; that afterwards judgment

on his said note was entered against him in the circuit court of

Peoria County in favor of Emma Stephens who claimed to be the

legal holder and owner thereof; that an execution was issued on

said judgment and placed in the hands of the Sheriff of Woodford

County who served it and threatened to make a levy thereon; that

because of the situation he paid the amount due on said judgment

and execution; that he is informed that under the law he was not

subject to garnishment because of said indebtedness for the reason

he was served with garnishee process on the date said note was

due; and that said service of process upon him was wrongful and

Replications were filed averring that the alleged assignment of the note from Sylvester Stephens to his daughter Emma Stephens was without consideration and void. A general demurrer was interposed to the replications but was not passed upon by the court. Without further detailing the steps taken in this proceeding, it is sufficient to say that the court sustained a motion of the garnishee to be dismissed and discharged. Error is assigned on such ruling.

Counsel for the respective parties have argued at considerable length the questions whether the garnishee summons was prematurely served, whether the Moore note was "due" or "past due", and whether the alleged transfer of the note from Stephens to his daughter was valid or invalid. But none of these questions are of controlling force in this case.

It has been long settled in this state that a judgment creditor of two joint judgment debtors cannot maintain garnishment for a debt due to one of such debtors. *Chicago & Northwestern Railway Co., et al, v. Scott, et al*, 174 Ill. 413; *Siegel v. Schueck*, 167 Ill. 522; *Baronski v. Shust*, 218 Ill. App. 8; *Cohn et al v. Malo*, 198 Ill. App. 539. It is therefore plain that a debt due from Moore to Stephens cannot be taken to satisfy a debt due from Dixon and Stephens.

The judgment of the trial court is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

7381

45/4a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 1A639³

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



People of the State of Illinois,

Defendant in Error,

vs.

Mike Minto and John Rose,

Plaintiffs in Error.

Error to the County Court
of DePage County.

Partlow, J.

238 I.A. 639

Plaintiffs in error, Mike Minto and John Rose, were found guilty in the county court of DePage county upon an information, the first count of which charged the illegal sale of intoxicating liquor, and the second count charged the illegal keeping for sale of intoxicating liquor. To review the judgment entered upon the verdict, a writ of error has been prosecuted from this court.

The first error urged is that the affidavit upon which the search warrant was issued was insufficient because it alleged as the reason for affiant's belief that intoxicating liquor was sold was that affiant sent an agent to the premises who bought intoxicating liquor. Under authority of Langdon vs. People, 133 Ill. 382, People vs. Pro, and People vs. Vannella, (decided by this court January 7, 1924,) and Goode vs. Commonwealth (Ky.), 252 S. W. 105, this affidavit was sufficient.

The premises to be searched were described as a certain frame building, basement and outbuildings, situated on the north side of Roosevelt Road, being the third place east of Parke Boulevard, and occupied as a soft drink parlor, in the town of Milton, DuPage County, Illinois. It is claimed there was no such building on the premises as described in the search warrant; that there was merely a one story frame building with no basement and no outbuildings except a toilet in the rear; for that reason the premises were not properly described in the

People of the State of Illinois,

Defendants in Error,

Plaintiffs in Error,

vs.

Mike Minto and John Rose,

Defendants in Error.

3381 A. 639

Verdict, 3.

Plaintiffs in error, Mike Minto and John Rose, were found guilty in the county of DuPage county upon an indictment the first count of which charged the illegal sale of intoxicating liquor, and the second count charged the illegal keeping for sale of intoxicating liquor. To review the judgment entered upon the verdict, a writ of error has been presented from this court.

The first error urged is that the affidavit upon which the search warrant was issued was insufficient because it alleged as the reason for affiant's belief that intoxicating liquor was sold was that affiant went on duty to the premises who bought intoxicating liquor. Under authority of *People v. Torgie*, 111 Ill. 2d, 302, 303, 190, and *Torgie vs. Torgie*, (1903) by this court January 7, 1934, and *State vs. Commonwealth (T.C.)*, 222 S. W. 2d, this affidavit was sufficient.

The premises to be searched were described as a certain frame building, basement and outbuilding, situated on the north side of Roosevelt Road, being the third place east of 10th Avenue, and occupied as a retail liquor store, in the town of Milton, DuPage County, Illinois. It is claimed that no such building or the premises as described in the search warrant; that there was merely a one story frame building with

affidavit; that under authority of People vs. Bishop, 225 Ill. App. 610, the description was insufficient. In the Bishop case the premises were described as a certain house, barn and out-buildings, etc., being more especially a flat building painted brown occupied by Stanley Bishop, on Victoria street, near 14th, in the city of North Chicago. In passing upon the question of the sufficiency of this description this court said: "Whether the premises mentioned in the writ was north, south, east or west of 14th does not appear. In fact we are assuming that '14th' is intended to indicate a street. Nothing is said in the warrant as to whether or not it is a street, but proceeding upon the assumption that '14th' is a street in North Chicago, a location of the premises to be searched as gathered from the writ is a brown flat building on Victoria street, somewhere near 14th street, and occupied by Stanley Bishop. The evidence shows that the flat building which was searched was not a brown building at all but was a tan or yellow building. The return of the officer upon the warrant shows that the building is located at 1419 Victoria street. Unquestionably the officer making the search was not left without doubt or the use of discretion as to the premises to be searched. He could not have located them by anything contained in the warrant except that they were occupied by Stanley Bishop. It has also been held that the description must be given with as much precision and accuracy as the circumstances will permit. In this case, if the building sought to be searched was located at 1419 Victoria street, the warrant should have so described it." In the case at bar, the premises were not so indefinitely described. They were described as being on the north side of Roosevelt Road, the third place east of Parke Boulevard. The evidence discloses that this description was correct. The warrant described the premises as a certain frame building, basement and out-buildings. The evidence shows it was a frame building, and

affidavit; that under authority of People vs. Bishop, 225 Ill. App. 610, the description was insufficient. In the Bishop case the premises were described as a certain house, barn and out-buildings, etc., being more especially a flat building painted brown occupied by Stanley Bishop, on Victoria street, near 14th, in the city of North Chicago. In passing upon the question of the sufficiency of this description this court said: "Whether the premises mentioned in the writ was north, south, east or west of 14th does not appear. In fact we are assuming that '14th' is intended to indicate a street. Nothing is said in the warrant as to whether or not it is a street, but proceeding upon the assumption that '14th' is a street in North Chicago, a location of the premises to be searched as gathered from the writ is a brown flat building on Victoria street, somewhere near 14th street, and occupied by Stanley Bishop. The evidence shows that the flat building which was searched was not a brown building at all but was a tan or yellow building. The return of the officer upon the warrant shows that the building is located at 1419 Victoria street. Unquestionably the officer making the search was not left without doubt or the use of discretion as to the premises to be searched. He could not have located them by anything contained in the warrant except that they were occupied by Stanley Bishop. It has also been held that the description must be given with as much precision and accuracy as the circumstances will permit. In this case, if the building sought to be searched was located at 1419 Victoria street, the warrant should have so described it." In the case at bar, the premises were not so indefinitely described. They were described as being on the north side of Roosevelt Road, the third place east of Park Boulevard. The evidence discloses that this description was correct. The warrant described

there was an outbuilding used as a toilet, there was a tent in the rear of the ~~year~~^{yard}, but there was no basement. The mere fact that there was no basement did not make the location described in the warrant so indefinite that it could not easily and with certainty be located by the officers. The description complied with the statute and was sufficient. The liquor ~~y~~ secured in the building was properly admissible in evidence.

It is next insisted that the evidence does not show a sale by both of the defendants. The evidence shows that on August 13, 1923, two deputy sheriffs went to the premises in question. Minto was in front of the building and Rose was in the back room. Minto waited upon the deputies and sold each of them three drinks, two of which they testified were beer and one was whiskey. While the witnesses were standing at the bar drinking, Minto asked them if they wished a "shot". They told him they did and he served them with whiskey, informing them that the shot was genuine bonded goods, and that he obtained it from a brother who was buying it from druggists in the city. Minto stated he built the building and put in the bar and fixtures. Both officers testified the liquor bought was intoxicating liquor. On August 18, 1923, five deputy sheriffs, armed with the search warrant raided the premises. Three of them went in the front door and two went in the rear door. As they approached the building they heard considerable noise. There were about twenty-five or thirty men in the place, drinking, singing, laughing, and having a good time. One of the officers testified there were four or five intoxicated men singing at one end of the bar. Minto was tending bar and Rose was outside the front door. One of the officers asked Rose if he was the proprietor of the place and he answered yes. The premises were searched and quantities of the intoxicating liquor were found which were taken by the officers, some of which was analyzed and found to

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contain as high as 51.7 per cent alcohol. Some of this liquor was found in the tent outside and some of it was found in the building itself. The liquor offered in evidence was found in the building. Rose testified he was employed by Minto, but the evidence shows the premises were known as the "Rose Inn", and that name was printed on the outside of the building. The jury was justified in finding that Minto and Rose were partners in the business. Even if it be conceded that Rose did not actually sell the liquor and was not a partner, there was sufficient evidence to show that he was an accessory before the fact, and on that ground the jury was justified in finding him guilty.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

After the above opinion had been filed with the clerk of this court but before it was publicly announced, counsel for plaintiff in error asked leave to file authorities relative to the sufficiency of the information.

The abstract does not contain the information. No motion was made in the trial court to quash it. The question of its sufficiency was not discussed or mentioned in the original brief filed by plaintiff in error.

Rule 16 of this court provided that the abstract must fully present every exception relied upon and every error alleged and will be taken to be sufficient for a full understanding of the questions presented for decision, etc. We have repeatedly held that the abstract must be so complete as to fully set out the error relied upon and sufficient for the determination of the case without an examination of the record itself. The same rule was announced by the Supreme Court in the recent case of *People v. Rabion*, 316 Ill. 75.

contains as high as 81.7 per cent alcohol. None of this liquor was found in the body cavity and none of it was found in the clothing itself. The liquor obtained in evidence was found in the clothing. None detected in the clothing by him, but the evidence shows the presence were known by the "Kane men", and that name was printed on the outside of the bottles. The jury was satisfied in finding that Kane and Kane were partners in the business. Even if it be assumed that Kane did not actually own the liquor and was not a partner, there was sufficient evidence to show that he was an accessory before the fact, and on that ground the jury was satisfied in finding the guilty.

He finds no reversible error and the judgment will be affirmed.

affirmed.

affirmed.

After the above opinion was filed with the clerk of this court but before it was publicly announced, counsel for defendant in error asked leave to file additional evidence relative to the sufficiency of the information.

The abstract does not contain the information. No motion was made in the trial court to quash it. The question of the sufficiency was not discussed or decided in the original brief filed by defendant in error.

Rule 15 of this court provided that the court might take evidence every case. It is well settled that every error alleged and will be taken to be without for a full consideration of the question presented for decision, etc. We have repeatedly held that the court must be so complete as to fairly and not the error relied upon was sufficient for the determination of the case without an examination of the record itself. The case was announced by the Justice Court in the record book of

5.

In *People v. Gilmore*, 196 Ill. App. 148, this court held that a question not argued or suggested in the opening brief of plaintiff in error cannot be raised for the first time in a reply brief, but is waived.

Under the facts as they are presented by the abstract we do not feel justified in reopening the case and permitting plaintiff in error to question the sufficiency of the indictment.

The judgment will be affirmed.

Judgment affirmed.

In *People v. Elmore*, 106 Ill. App. 3d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Under the facts as they are presented by the evidence, we do not find anything in the evidence to establish the guilt of the defendant in the crime charged. The evidence is in favor of the defendant.

The judgment will be affirmed. The defendant is guilty of the crime charged.

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STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

7387

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 639⁴

BE IT REMEMBERED, that afterwards, to-wit: On
APR 25 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

142

[Faint, illegible handwritten text, possibly a letter or journal entry.]

[Faint, illegible handwritten text, possibly a letter or journal entry.]

The People of the State of
Illinois,

Deft. in error,

vs.

Fred Weinschenker,

Pltf. in error,

Error to the Circuit

Court of McHenry County.

238 I.A. 639

Partlow, J.

Plaintiff in error, Fred Weinschenker, was found guilty in the circuit court of McHenry County, under the first count of an indictment charging a violation of the prohibition law, and to review the judgment entered upon the verdict a writ of error has been prosecuted from this court.

Various reasons are urged why the judgment should be reversed but it will be necessary to consider only one of them. A motion to quash the indictment was overruled and that ruling is assigned as error. The indictment did not comply with the rule announced in *People v. Martin*, 314 Ill. 110, and *People v. Barnes*, 314 Ill. 140. The court was in error in overruling the motion to quash and for that reason the judgment will be reversed and the cause remanded.

Reversed and remanded.

The People of the State of

Illinois,

Defendant in error,

vs.

Fred Weinshenker,

Plaintiff in error.

Court of Winnebago County,
Error to the Circuit

\$381 A. 633

Verdict, 5.

Plaintiff in error, Fred Weinshenker, was found guilty in the circuit court of Winnebago County, under the first count of an indictment charging a violation of the prohibition law, and to receive the judgment entered upon the verdict a writ of error has been presented from this court.

Various reasons are urged why the judgment should be reversed but it will be necessary to consider only one of them. A motion to quash the indictment was overruled and that ruling is assigned as error. The indictment is/first count only with the title announced in People v. Martin, 314 Ill. 110, and People v. James v. Barnes, 324 Ill. 140. The court was in error in overruling the motion to quash and for that reason the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
May in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.



abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 639⁵

BE IT REMEMBERED, that afterwards, to-wit: On
APR 20 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE [illegible] OF [illegible]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

A. W. Duckworth, W. A. Duckworth,
and W. W. Hipke,

appellees,

vs.

Appeal from the County Court
of Kankakee County.

Jesse Tobey, doing business as
Tobey Grain Company,

appellant,

238 I.A. 639

Partlow, J.

Appellees, A. W. Duckworth, W. A. Duckworth, and W. W. Hipke, began suit before a justice of the peace in Kankakee county, against appellant, Jesse Tobey, doing business as Tobey Grain Company, to recover \$300.00 due as rent which appellees claimed appellant illegally paid to other parties after notice not to make such payment. From a judgment in favor of appellees, an appeal was prosecuted to the county court of Kankakee county, where a jury was waived, and upon a trial before the court, judgment was rendered against appellant for \$300.00, and this appeal followed.

The evidence shows that James and John Inkster, who were brothers, owned 280 acres of land in Kankakee county. There was a first mortgage on the land to Louis E. Beckman, a second mortgage to the First Trust & Savings Bank of Kankakee, and third and fourth ~~sub~~ mortgages to appellees. James and John Inkster conveyed the land subject to the mortgages to Mattie A. Foreman, who was a sister-in-law of James Inkster. On March 1, 1921, Mattie A. Foreman executed a lease on the land for one year to Henrietta Inkster, wife of John Inkster, which lease provided for payment as rent of one-half of the grain, and \$6.00 per acre for hay and pasture lands, which amounted to about fifty acres. At the expiration of this lease on March 1, 1922, the tenant held over until March 1, 1923.

Louis E. Beckman and the First Trust & Savings Bank of Kankakee filed bills in the circuit court to foreclose the first and second

A. V. Henshaw, A. A. Henshaw,
and V. A. Henshaw,

appellees,

vs.

Jesse Tobey, doing business as

Tobey Grain Company,

appellant,

Verdict, 7.

Appellees, A. V. Henshaw, A. A. Henshaw, and V. A. Henshaw,

plead and before a Justice of the Peace in Laramie County, against

appellant, Jesse Tobey, doing business as Tobey Grain Company, to

recover \$200.00 and an amount which appellees claimed appellant should

pay to them after certain other matters had been paid.

From a judgment in favor of appellees, an appeal was presented to

the County Court of Laramie County, where a jury was called, and

from a trial before the court, judgment was rendered against appel-

lant for \$200.00, and this appeal follows.

The evidence shows that James and John Lusk, who were

partners, owned 280 acres of land in Laramie County. There was a

first mortgage on the land to Louis H. Beckman, a second mortgage

to the First Trust & Savings Bank of Kansas, and third was loaned

to appellees, James and John Lusk, who were partners.

Land subject to the mortgage to Louis H. Beckman, who was a

partner-in-law of James Lusk. On March 1, 1901, Louis H. Beck-

man executed a lease on the land for one year to appellees, James

and John Lusk, which lease provided for payment on part of

one-half of the grain, and \$2.00 per acre for hay and pasture.

At the expiration of this

lease on March 1, 1902, the same was paid over until March 1, 1903.

appeal from the County Court

of Laramie County.

2381 A. 689

filed cross bills in these cases praying for a strict foreclosure. On February 6, 1921, a receiver was appointed to collect the rents. On February 4, 1922, a decree of strict foreclosure in favor of appellees on their cross bill, was entered which provided for six months equity of redemption to the owner of the fee, which made the equity of redemption expire on August 4, 1922. On July 31, 1922, four days before the equity of redemption expired, the receiver was discharged. Appellees entered into possession on August 4, 1922. At that time the oats crop had been harvested and the landlord's share had been delivered to Mattie A. Foreman. The corn crop had not matured, and appellees claimed that the cash rent had not been paid. When the corn was shucked, one-half of it was delivered to appellees, and the other half, being the tenant's share, was delivered by the tenant to appellant, who was a grain buyer at Herscher, Illinois, near where the farm was located. Appellees notified appellant not to pay the tenant's share of the corn crop until the \$300.00 cash rent for the hay and pasture land had been paid to appellees. On February 20, 1923, the tenant executed a bond to appellant, with Fred Wood, a son-in-law of James Inkster, as surety, which bond recited that Henrietta Inkster was a tenant on the farm owned by appellees, and was indebted to them for \$300.00; that appellees had served notice on appellant that they held a lien on this grain for \$360.00, and that appellant deducted \$360.00 from the amount due Henrietta Inkster because of said lien; and that appellant delivered the amount of said lien, to-wit; \$300.00, to Henrietta Inkster; the condition of the obligation being to protect appellant from any and all judgments against him, including costs and attorney's fees arising out of the delivery of said money to Henrietta Inkster. After this bond had been given and appellant had paid the \$300.00 to Henrietta Inkster, appellees began this suit against appellant before a justice of the peace to recover the cash unpaid.

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 to appellant, with Fred Wood, a son-in-law of James Inkster, as
 surety, which bond recited that Henrietta Inkster was a tenant on
 the farm owned by appellees, and was indebted to them for \$300.00;
 that appellees had served notice on appellant that they held a lien
 on this grain for \$260.00, and that appellant debited \$260.00
 from the amount due Henrietta Inkster because of said lien; and that
 appellant delivered the amount of said lien, to-wit: \$260.00, to
 Henrietta Inkster; the condition of the obligation being to protect
 appellant from any and all judgments against him, including costs
 and attorney's fees arising out of the delivery of said money to
 Henrietta Inkster. After this bond had been given and appellant
 had paid the \$300.00 to Henrietta Inkster, appellees began this suit

The first ground of reversal urged is that the cash rent was in fact paid to Mattie A. Foreman, prior to August 4, 1922. In support of this claim Fred Wood, who ran a restaurant in Herscher, testified that he paid Mattie A. Foreman \$100.00 on July 12, 1922, and she gave him a receipt in full for \$300.00; that he made a second payment of \$100.00 "around August 1", and a third payment of \$100.00 "sometime after August 4", that he took from John Inkster a note for \$300.00 on July 20, 1922, "for money loaned to us".

For the purpose of showing the improbability of this evidence, appellees claim that Wood did not remember any of the details of these various payments, where they were made, who was present when they were made, or whether they were in cash, or by check; that he carried on account in both banks in Herscher, usually having a daily balance of from \$200.00 to \$600.00; that the ledger sheets from these banks showed no checks for \$100.00 issued during July or August, 1922; that Mattie A. Foreman, who was a Chicago school teacher, spent the summer of 1922 at Havanna, Illinois, 115 miles from Herscher, and that it is not probable that these payments were made in cash, nor that payments of amounts of this size would be made in cash without the witness recalling something about it; that Mattie A. Foreman was not a witness at the trial, and that no testimony concerning the payments was made by James or John Inkster, both of whom were in court at the time of trial; that Wood and Henrietta Inkster gave the bond to appellant, and the language used there indicated that no cash rent had been paid; that the condition of the bond was that Henrietta Inkster was indebted under the lease to appellees in the sum of \$360.00, that she had sold grain to appellant, and that appellees had served a notice on appellant that they had a lien to the amount of \$360.00; that if Henrietta Inkster had already paid the cash rent she would not have signed a bond admitting indebtedness under the lease, and that Wood, who claimed to have furnished the money, would not have been a co-signer of the bond if the rent had been paid; that if Wood had already paid

The first ground of reversal urged is that the cash rent was in fact paid to Mattie A. Foreman, prior to August 4, 1932. In support of this claim Fred Wood, who ran a restaurant in Herscher, testified that he paid Mattie A. Foreman \$100.00 on July 12, 1932, and she gave him a receipt in full for \$300.00; that he made a second payment of \$100.00 "around August 1", and a third payment of \$100.00 "sometime after August 4", that he took from John Inkster a note for \$300.00 on July 20, 1932, "for money loaned to us".

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Both of whom were in court at the time of trial; that Wood and Henrietta Inkster gave the bond to appellant, and the language used there indicated that no cash rent had been paid; that the condition of the bond was that Henrietta Inkster was indebted under the lease to appellees in the sum of \$300.00, that she had sold grain to appellant, and that appellees had served a notice on appellant that they had a lien to the amount of \$300.00; that if Henrietta Inkster had already paid the cash rent she would not have signed a bond admitting indebtedness under the lease, and that Wood, who claimed

the \$300.00, he would not have permitted appellant to hold back \$360.00 instead of \$300.00; that the report of the receiver was filed May 13, 1922, showing that the cash rent for 1921 was not paid until May 12, 1922; that it is hardly probable that rent for 1922 would be paid less than two months afterward, and eight months before it became due, nor is it probable that Mattie A. Foreman would have demanded the rent eight months before it was due; that the receiver continued to act until his discharge on July 31, 1922, and his report showed that on May 12, 1922, he received the cash rent for the previous year, and on July 14, 1922, he paid the taxes, and on July 29, 1922, turned over the balance to Mattie A. Foreman; that any payment of cash rent should have been made to the receiver and not to the owner of the fee, and any payment made to any one but the receiver, before he was discharged, was illegal.

The most that can be said of this evidence relative to payment is that it is in conflict. In order for us to reverse the judgment on the ground that it is not sustained by the evidence, it is necessary for us to say that the finding of the trial court is manifestly against the weight of the evidence. The trial court saw the witnesses and heard them testify. He is in a better position than is a court of review to determine the weight to be given to the testimony. For this reason we do not feel justified in reversing the judgment on the ground that the rent was paid prior to August 4, 1922.

It is next contended that under Section 1, Chapter 80, of the Statute, before appellees were entitled to sue for the rent they were required to make a demand in writing for possession, and there is no evidence that any such demand was ever made; that their remedy in the first instance was eviction, and before they could sue they must first make a demand for possession in writing, and there must be a refusal to comply with the demand, and there having been no such demand they cannot maintain a suit for rent. In support of this contention appellant cites Reichert v. Bankson, 199 Ill. App.95.

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In that case it was held that the relation of landlord and tenant does not exist between the purchaser at a mortgage foreclosure sale who has received a deed, and a tenant of the mortgagor under a lease subsequent to the mortgage where such tenant has not attorned to the mortgagee, and it is immaterial that such purchaser has demanded rent of such tenant; also that the purchaser at a mortgage foreclosure sale of premises under a mortgage executed prior to the lease by the mortgagor who has received a deed, is not entitled to recover rent from a tenant who has not attorned to him where he has served a demand in writing upon the tenant to surrender possession of the premises after receiving the deed as required by the landlord and tenant act. This case turns upon the question of attornment, and the court held that since there had been neither an attornment, nor a demand for possession, the foreclosure purchaser would not collect rent from the tenant under a lease made subject to the mortgage.

In the case at bar the lease was executed March 1, 1921, expired on March 1, 1922, but the tenant held over until March 1, 1923. Upon the expiration of the equity of redemption appellees took possession. After this possession was taken, the tenant recognized the appellees as her landlord, and appellees received their share of the corn crop. By this act the tenant recognized appellees as her landlord. This is evident, not only from the fact that appellees received their share of the corn crop, but in the bond executed by the tenant to appellant, it is recited that Henrietta Inkster is the tenant on the farm owned by appellees. The bond was dated February 20, 1922, before the expiration of the lease and before this suit was tried. Where tenants hold over at the expiration of the term of a lease without any contract or agreement and pay rent, they become tenants under the same terms as the original lease. *Prichett vs. Ritter*, 16 Ill. 96; *Goldsbrough vs. Gable*, 140 Ill. 262 269. A tenant in possession under a lease subsequent to the mortgage may be treated as a trespasser

In that case it was held that the relation of landlord and tenant does not exist between the purchaser of a mortgage foreclosed sale, who has received a deed, and a tenant of the mortgagor under a lease subsequent to the mortgage where such tenant has not attorned to the mortgagee, and it is immaterial that such purchaser has demanded rent of such tenant; also that the purchaser at a mortgage foreclosure sale of premises under a mortgage executed prior to the lease by the mortgagor who has received a deed, is not entitled to recover rent from a tenant who has not attorned to him where he has served a demand in writing upon the tenant to surrender possession of the premises after receiving the deed as required by the landlord and tenant act. This case turns upon the question of attornment, and the court held that since there had been neither an attornment, nor a demand for possession, the foreclosure purchaser could not collect rent from the tenant under a lease made subject to the mortgage.

In the case at bar the lease was executed March 1, 1921, expired on March 1, 1923, but the tenant held over until March 1, 1923. Upon the expiration of the term of redemption appelles took possession. After this possession was taken, the tenant redemined the appelles as her landlord, and appelles received their share of the corn crop. By this act the tenant redemined appelles as her landlord. This is evident, not only from the fact that appelles received their share of the corn crop, but in the bond executed by the tenant to appellant, it is recited that the bond was dated February 20, 1923, before the expiration of the lease and before this suit was tried. Where tenants hold over at the expiration of the term of a lease without any contract or agreement and pay rent, they become tenants under the same terms as the original lease. *Trickett vs. Ritter*, 16 Ill. 2d 56; *Bohler*

by the foreclosure purchaser and ejected, or the purchaser may accept an occupying tenant as his tenant. Black on Mortgages, Section 442; Reed vs. Bartlett, 9 Ill. App. 267. Payment of rent is sufficient attornment. Bradley & Co. vs. Peabody Coal Company, 99 Ill. App. 427. There was an attornment in this case between the appellees and Henrietta Inkster and for that reason no demand in writing for possession was necessary before the suit was brought.

Appellant also contends that the record in this case is largely made up of what transpired in the justice's court; that this evidence was incompetent and that the case should have been tried in the county court de novo. Appellees attempted to prove on the trial in the county court that in the justice court, Wood and James and John Inkster were present, and they made no defense on the grounds of payment, and various other proof was offered relative to these facts. We do not know just what took place before the justice of the peace. It was not necessary for appellant, at that time, to put in any evidence, or make any defense, if he did not see fit so to do. We do not think, however, that there can be any serious error in the admission of the evidence. The trial was before the court without a jury, and there is sufficient evidence in the record, if the court believed it, to sustain the judgment rendered. If the trial had been before a jury some question might have been raised relative to this evidence, but under the facts here presented we do not find that any serious error was committed.

For these reasons the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. }
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 24th day of
June in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

Abstract only

7449

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 640¹

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 20 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Rehearing Denied Sept. 26, 1925

The People of the State of Illinois,

Defendant in error,

vs.

Charles Morris,

Plaintiff in error,

Writ of error to the

County Court of Bureau

County.

238 I.A. 640

Partlow, J.

Plaintiff in error, Charles Morris, was found guilty in the county court of Bureau county upon the third count of an information charging the illegal possession of intoxicating liquor, and to review the judgment entered upon the verdict a writ of error has been prosecuted from this court.

Several reasons are urged why the judgment should be reversed, but we will consider only one of them. A motion was made to quash the third count of the information, and the motion was overruled. The information did not state a good cause of action under the rules announced in *People vs. Martin*, 314 Ill. 110, and *People vs. Barnes*, 314 Ill. 140, and the court was in error in not sustaining the motion. For this reason the judgment will be reversed and the cause remanded.

The People of the State of Illinois,

Defendants in error,

vs.

vs.

Plaintiffs in error,

Charles Morris,

County.

Plaintiff in error,

288 I.A. 640

Section 1.

Plaintiff in error, Charles Morris, was found guilty

in the county court of Illinois county upon the fifth count of

an information charging the illegal possession of intoxicating

liquor, and to review the judgment entered upon the verdict

a writ of error has been presented from this court.

Several reasons are urged why the judgment should be

reversed, but we will consider only one of them. A motion was

made to quash the third count of the information, and the

motion was overruled. The information did not state a good

cause of action under the rules announced in People vs. Morris,

304 Ill. 110, and People vs. Palmer, 316 Ill. 140, and the court

was in error in not sustaining the motion. For this reason

the judgment will be reversed and the cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

abstract only

24515a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 640²

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 18 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

THOMAS M. JETT, Justice.

US L. JOHNSON, Clerk.

WELT

CLERK

238 T.A. 640

ORDERED, that afterwards, to-wit: On
the opinion of the Court, was filed in the
said Court the words and figures

Anthony Dudas,

appellant,

vs.

W. H. Morlock,

appellee,

Appeal from the City Court of
the City of Aurora.

238 I.A. 640

Jett, J.

Anthony Dudas, appellant, instituted suit against W. H. Morlock, in the city court of Aurora, to recover damages for a personal injury, and for damages to his automobile, occasioned in a collision on a public street, in the City of Aurora, on the ninth day of September, 1921. A jury trial was had and at the close of the evidence, on the part of appellant, the court on motion of appellee, directed a verdict.

Motions for a new trial and in arrest of judgment were made and denied and judgment rendered against appellant from which he prosecutes this appeal. As the appellant was plaintiff below, the parties will be referred to as plaintiff and defendant. The declaration consists of two counts. The first count charges that the plaintiff, on September 9th, 1921, was the owner and possessor of an automobile, which he was driving on a public street in the City of Aurora; that the defendant was then and there the owner of a certain automobile which was being operated and driven by Paul H. Morlock, a son and member of the family of the defendant, by the authority and direction of the defendant and in connection with the family use of said defendant, and for his purposes and in his interest, and that while so operating and driving said automobile, the said Paul H. Morlock, son as aforesaid, was then and there the agent and servant of the defendant; that he the plaintiff was in the exercise of due care and caution and was observing a proper regard for the personal safety of himself and others, and for the safety of his automobile; that the said Paul H. Morlock, servant and agent of the defendant, and in charge of said automobile, so

appeal from the city court of
the city of London.

238 I.A. 640

...in the city court of London, to recover damages for a
personal injury, and for damages to his automobile, occasioned
in a collision on a public street, in the city of London, on the
eleventh day of September, 1921. A jury trial was had and of the
verdict of the jury, on the part of appellant, the verdict was
...for a new trial and an award of damages were made
and appeal was taken from the verdict of the jury and the
...this appeal. As the appellant was plaintiff below, the
...will be referred to as plaintiff and defendant. The de-
...consists of two counts. The first count charges that
the plaintiff, on September 9th, 1921, was the owner and possessor
of an automobile, which he was driving on a public street in the
city of London; that the defendant was then and there the owner of
a certain automobile which was being operated and driven by Paul
M. Huxford, a son and member of the family of the defendant, by the
negligence and direction of the defendant and in connection with the
...was of said defendant, and for his purpose and in his
...and that while so operating and driving said automobile,
the said Paul M. Huxford, son of defendant, was then and there the
...of the defendant that he the plaintiff was in
...and was driving said automobile and was operating a motor
...the personal injury to plaintiff and damage to his

carelessly, negligently and improperly drove, managed and operated it, that the said automobile struck and collided with the plaintiff's automobile at the time and place aforesaid, with great force, and thereby and through said careless, negligent and improper conduct of the said Paul H. Morlock, servant of the defendant, so striking the automobile of the plaintiff, by means whereof the plaintiff necessarily incurred damages and expenses to his automobile.

The second count of the declaration is the same as the first except that it is based upon the personal injuries and damages alleged to have been sustained and suffered by the plaintiff.

The defendant pleaded the general issue and two special pleas. The first special plea is, that he was not possessed of, operating, controlling, driving or using the automobile when the accident occurred; second, that at the time and place mentioned in the declaration, the automobile was not being used, controlled, or driven by his agent or servant. The facts are not disputed. It is admitted that the defendant owned and kept the automobile for the comfort and pleasure of himself and family, which consisted of his wife and six children, including his son Paul, who was permitted to operate the automobile for his own pleasure and the pleasure of other members of the family, and that at the time of the injuries complained of, Paul was on his way to school, and that he was authorized and allowed to use the automobile in attending school.

The evidence fairly tends to prove the negligence charged in the declaration and the resultant damages. No question is involved in this court as to the negligent operation of the automobile, or the due care and caution of the plaintiff. The defendant relies on his special pleas as a complete defense. For the purposes of the trial it was stipulated that Paul H. Morlock was nineteen years of age at the time of the collision in question. It is the contention of the defendant that there is no relation of master and servant nor of agency, but simply and only the relation of parent and child; that there is no liability and that the court properly instructed the

3
jury to return a verdict of not guilty. From the arguments made by the plaintiff and defendant, it appears they both rely on the case of Arkin v. Page, 287 Ill. 420, and Graham v. Page, 300 Ill. 43. We will not undertake to state in this opinion the rule announced in either the Arkin or the Graham cases for the reason that since each of those opinions were adopted, the rule has been extended. It appears that the liability of the owner of an automobile, kept for family purposes, when used by a member of his family, has gradually been extended; the doctrine has been developed step by step in Illinois, until it has now reached a stage where the court holds that when the head of a ~~man~~ family makes it his business to furnish an automobile to provide recreation and pleasure for the members of the family, he is responsible for its negligent use by any one of the family having his permission to use it.

The recent case of Gates v. Mader, 316 Ill. 313, is one in which the declaration alleged the negligent operation and control of the automobile and due care and caution of the plaintiff. Mader filed special pleas, alleging that at the time of the injury he did not drive, operate or control the automobile personally or by his agent or servant. He did not deny the ownership of the automobile, but relied on his special pleas as a complete defense. The defendant is an osteopathic physician, and owns his automobile, which is used by him in making professional calls and for the pleasure and use of his family. His wife could not drive the car but she had the permission and the privilege, when the defendant could not drive for the family, of taking the car out for pleasure, and getting some one to drive for her. Defendant's son, Ervin Mader, who was driving the car at the time of the accident in question was twenty four years of age; was employed at and lived in the South Shore Hospital in Chicago and visited his parents about once a week. The defendant testified he never objected to his son driving the car or to taking the family out in it for pleasure; that he did not know of the particular drive when the accident occurred until it was over. In the car with the son was his mother, two sisters, a niece of Mrs.

The first question is whether the defendant is liable for the injury to the plaintiff. The second question is whether the defendant is liable for the injury to the plaintiff. The third question is whether the defendant is liable for the injury to the plaintiff. The fourth question is whether the defendant is liable for the injury to the plaintiff. The fifth question is whether the defendant is liable for the injury to the plaintiff. The sixth question is whether the defendant is liable for the injury to the plaintiff. The seventh question is whether the defendant is liable for the injury to the plaintiff. The eighth question is whether the defendant is liable for the injury to the plaintiff. The ninth question is whether the defendant is liable for the injury to the plaintiff. The tenth question is whether the defendant is liable for the injury to the plaintiff.

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Mader, and a lady friend and her daughter. It appears that Ervin, had returned home the evening before and agreed to drive the family in the car to a luncheon, and while on the way the accident happened. On these facts, notwithstanding what had been said in the Arkin and Graham cases, the court sustained the judgment against the defendant and in its opinion among other things said; "The question involved in this case, is whether under the evidence, the defendant is liable. At the time of the injury the car was being driven by defendant's son for the pleasure and convenience of the family.

* * * * * If defendant had himself been driving, it could not be denied he would have been liable for negligent injury, and the decided weight of authority, we think, makes him liable under the evidence in this case, for the negligence of the son." * * * * *

"In our opinion, liability in this case is based on reason and justice. Defendant denied he knew the car was going to be used on the particular occasion but admits its use was authorized by him. This case is not controlled by the Arkin case. We do not think the question of defendant's liability is affected by the fact that his son was of adult age, and worked and lived in a hospital. In some of the cases where liability was sustained the son or daughter who was driving the car was a minor, but we do not re-call that any case made a distinction on account of age, under the facts similar to those involved in this case." In view of the conclusion reached and the rule announced as above, the City Court of Aurora erred in directing a verdict at the close of the plaintiff's evidence, and in overruling the motions for a new trial and in arrest of judgment.

The judgment of the city court of the city of Aurora, is reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
June in the year of our Lord one thousand
nine hundred and twenty-five
Justus L. Johnson
Clerk of the Appellate Court.

IT IS REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
in the words and figures

A. Provenzano,

appellee,

vs.

Rock Falls Manufacturing
Company, a corporation,
appellant.

Appeal from the City Court
of the City of Sterling,
Illinois.

238 I.A. 640

Jett, J.

The questions raised on appeal in this cause are the same as those involved in Julius Lurie, Appellee, vs. Rock Falls Manufacturing Company, a Corporation, Appellant, being Number 7479, and heard at the April Term, 1925, of this court.

The opinion therefore, in Number 7479, controls this case and the judgment is reversed and the cause remanded.

Reversed and Remanded.

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Administrative Council, Government of India, New Delhi

1949 and heard at the April Term, 1958 of this Court.

The opinion therefore, in Number 7477, contains this error

and the instant is reversed and the same result.

• *Reference: Am. Statist.*

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 1st day of
July in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

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Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 6404

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 1 - 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

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W. H. WINTER, Sheriff.

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EMERSON, that afterwards, so-will: On
the opinion of the court was filled in
e of said Court in the words and figures

The People of the State of Illinois,

Defendant in error,

vs.

Peter Troy and Martin Chiado,

Plaintiff in error.

Writ of error to the County

Court of Bureau County.

233 I.A. 640

Partlow, J.

The plaintiff in error, Martin Chiado, was found guilty by a jury in the county court of Bureau county upon the fourth count of an information which charged him and Peter Troy with the illegal possession of intoxicating liquor. Peter Troy was never apprehended and the plaintiff in error was tried alone. The court sentenced plaintiff in error to pay a fine of \$400.00 and costs, and a writ of error has been prosecuted from this court to review the judgment.

If it is first insisted that the affidavit attached to the information was insufficient and therefore the motion in arrest of judgment should have been sustained. The record shows that the plaintiff in error was arraigned and entered a plea of not guilty. After the jury had been selected and sworn, plaintiff in error, without withdrawing his plea of not guilty, made a motion to quash the information upon the ground that the affidavit attached thereto was sworn to upon information and belief. Thereupon the state's attorney asked leave to amend the information. After considerable talk between the court and counsel, plaintiff in error withdrew his motion to quash, and the state's attorney withdrew his motion for leave to amend the affidavit. The motion for a new trial is in writing and contains twelve specific grounds, none of which question the sufficiency of the affidavit attached to the information. The motion in arrest of judgment is also in writing and contains three specific reasons why the judgment should be arrested. The second ground is the only one which would even tend to question the sufficiency of the affidavit and it is so general in its terms that it is doubtful whether even it would be sufficient. It is very apparent that the

April 19th, 1914.

1914

The People of the State of Illinois,

Defendant in Error,

Writ of error to the County

Court of Jackson County.

John T. and Charles C. Clark,

Plaintiff in Error.

2381.A. 640

1914, 1.

The Plaintiff in error, Charles C. Clark, was found guilty by a jury in the County Court of Jackson County, and the Court entered an information which charged him and John T. Clark with the offense of possession of intoxicating liquor. John T. Clark was never indicted and the Plaintiff in error was tried alone. The Court sentenced

Plaintiff in error to pay a fine of \$400.00 and costs, and a writ of error has been presented from this Court to review the judgment.

It is first insisted that the affidavit attached to the information was insufficient and therefore the motion in arrest of judgment should have been sustained. The record shows that the Plaintiff in error was arraigned and entered a plea of not guilty. After the jury had been selected and sworn, Plaintiff in error, without objection, moved his plea of not guilty, made a motion to quash the information upon the ground that the affidavit attached thereto was sworn

to upon information and belief. Thereupon the State's attorney asked leave to amend the information. After considerable talk between the Court and counsel, Plaintiff in error withdrew his motion to quash, and the State's attorney withdrew his motion for leave to amend the affidavit. The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb. The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb. The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb.

The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb. The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb. The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb. The motion for a new trial is in violation of the constitution which provides that no person shall be twice put in jeopardy of life or limb.

plaintiff in error withdrew his motion to quash upon an agreement with the state's attorney that if the state's attorney did not amend the affidavit that plaintiff in error would withdraw his motion. Even where the affidavit is defective, or where there is no affidavit whatever, the objection can be waived by the plaintiff in error. People vs. Honaker, 281 Ill. 295; People vs. Clark, 211 Ill. App. 586. It would manifestly be unfair in this condition of the record to permit plaintiff in error to raise the question for the first time in this court. He waived it in the trial court and will not be heard to complain after such waiver.

It is next insisted that the evidence is insufficient to sustain the verdict. The evidence shows that plaintiff in error lived at 422 West Devlin Street, Spring Valley, Illinois. His family consisted of his wife and children and they lived in a four room house with a basement. The basement was divided by partitions into three compartments. On February 2, 1924, between nine and ten o'clock at night, the sheriff of Bureau county and his deputies visited this house with a search warrant. The plaintiff in error was at home and the sheriff asked him if he had any intoxicating liquor. He replied that he had a little wine in the basement. The officer searched the basement and found ten fifty gallon barrels of wine on a rack in one of the rooms. In another room they found four or five gallons of wine which plaintiff in error stated belonged to him and which he had made before the prohibition law went into effect and which he used for family purposes. Samples were taken from these various containers and the ten barrels were removed from the basement by the officers. The samples taken from the ten barrels tested from ten to fourteen per cent of alcohol by volume. The samples from the ten barrels were offered in evidence but the wine which plaintiff in error claimed he had made before the law went into effect was not offered in evidence. The plaintiff in error testified that on November 1, 1924, he rented one of these rooms in the basement to Peter Troy and that Peter Troy put these ten barrels of liquor into the basement and told plaintiff in error that it was sour wine and had spoiled. This is substantially the evidence

plaintiff in error withdrew his motion to grant an adjournment with the state's attorney and the state's attorney did not move the affidavit in error would withdraw his motion. Even where the affidavit is defective, or where there is no affidavit, the objection can be waived by the plaintiff in error. People vs. Hamilton, 281 Ill. 295; People vs. Clark, 211 Ill. App. 580. It would manifestly be unfair in this condition of the record to permit plaintiff in error to raise the question for the first time in this court. He waived it in the trial court and will not be heard to complain after such waiver.

It is next insisted that the evidence is insufficient to sustain the verdict. The evidence shows that plaintiff in error lived at 422 West Devon Street, Chicago, Illinois. His family consisted of his wife and children and they lived in a two room house with a basement. The basement was divided by a partition into three apartments. On February 2, 1924, between nine and ten o'clock at night, the sheriff of Cook County and his deputies visited this house with a search warrant. The plaintiff in error was at home and the sheriff asked him if he had any intoxicating liquor. He replied that he had a little wine in the basement. The sheriff searched the basement and found ten fifty gallon barrels of wine on a rack in one of the rooms. In another room they found four or five gallons of wine which plaintiff in error stated belonged to him and which he had made before the prohibition law went into effect and which he used for family purposes. During this time the three various containers and the two barrels were removed from the basement by the officers. The samples taken from the barrels tested them as to be found as tested by witness. The samples from the two barrels were placed in evidence and the wine which plaintiff in error claimed he had made before the law went into effect was not offered in evidence. The plaintiff in error testified that on November 1, 1924, he tested one of these wines in the basement at 422 West Devon Street and that it was found to be of the same nature as the samples taken from the barrels.

5
in the case.

Section 40 of the Prohibition Act provides that the possession of liquor by any person not legally permitted under the act to possess liquor, shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provision of the act. When the sheriff and his deputies found this liquor in the possession of plaintiff in error it made a prima facie case against him. The mere fact, that he testified that the liquor belonged to Troy and did not belong to him, and that he had rented this room to Troy for three months at \$5.00 per month, was a question of fact for the jury to determine whether that statement was true or otherwise. This court will not usurp the functions of the jury by substituting its judgment for theirs when passing on the weight of the evidence and the credibility of the witnesses unless we can say that the evidence is not sufficient to sustain the verdict. Rogers vs. People, 98 Ill. 581; Steffy vs. People, 130 Ill. 98; People vs. Horschler, 231 Ill. 566; People vs. McCann, 247 Ill. 130. If the jury believed the testimony of plaintiff in error they were justified in returning a verdict in his favor. If on the other hand they did not believe his testimony, the evidence on behalf of the People, was sufficient to sustain the conviction. Under these circumstances we do not feel justified in saying that the verdict is contrary to the evidence.

Complaint is made of the refusal of the trial court to give the first, second and third instructions submitted on behalf of the plaintiff in error. We have examined these instructions and they announce correct rules of law. It appears however, that eleven instructions were given by the court on behalf of plaintiff in error and these instructions fully covered every proposition of law necessary for the jury to understand in order to return a proper verdict. All of the instructions refused were covered by instructions given.

Complaint is made of the first, fourth and ninth instructions given on behalf of the defendant in error. The first instruction is substantially Section 40 of the Prohibition Act, and the fourth

in the case. Section 40 of the Evidence Act provides that the jury shall be sworn by any person not legally qualified under the act to be sworn. It shall be prima facie evidence that such person is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provision of the act. When the sheriff and his deputies found this liquor in the possession of plaintiff in error it made a prima facie case against him. The mere fact that he testified that the liquor belonged to Troy and did not belong to him, and that he had rented this room to Troy for three months at \$5.00 per month, was a question of fact for the jury to determine whether that statement was true or otherwise. The court will not carry the burden of the fact by requiring the testimony of the witness when passing on the weight of the evidence and the weight of the evidence unless we can say that the evidence is not sufficient to sustain the verdict. Rogers vs. People, 98 Ill. 581; People vs. People, 120 Ill. 38; People vs. People, 122 Ill. 581; People vs. McDann, 247 Ill. 120. If the jury believed the testimony of plaintiff in error they were justified in returning a verdict in his favor. If on the other hand they did not believe his testimony, the evidence on behalf of the People, was sufficient to sustain the conviction. Under these circumstances we do not feel justified in saying that the verdict is contrary to the evidence. Complaint is made of the refusal of the trial court to give the first, second and third instructions submitted on behalf of the plaintiff in error. We have examined these instructions and they announce correct rules of law. It appears however, that eleven instructions were given by the court on behalf of plaintiff in error and these instructions fully covered every proposition of law necessary for the jury to understand in order to return a proper verdict. All of the instructions refused were given by instructions given. Complaint is made of the first, fourth and sixth instructions given on behalf of the defendant in error. The first instruction stated that the jury should not return a verdict in favor of the defendant unless they believe the evidence beyond a reasonable doubt. The fourth instruction stated that the jury should not return a verdict in favor of the defendant unless they believe the evidence beyond a reasonable doubt. The sixth instruction stated that the jury should not return a verdict in favor of the defendant unless they believe the evidence beyond a reasonable doubt.

instruction is substantially in the language of Section 28. There was no error in giving either of them. The ninth instruction told the jury how they should weigh the testimony of plaintiff in error. It has been approved on many occasions. *Miller vs. The People*, 229 Ill. 376; *People vs. Scarbak*, 245 Ill. 435; *People vs. Harrison*, 261 Ill. 517; *People vs. Dougherty*, 266 Ill. 420; *People vs. Lalor*, 290 Ill. 234; *People vs. Maciejewski*, 294 Ill. 390. There was no error in any of the instructions given or refused.

It is next insisted that the verdict was the result of passion and prejudice, and complaint is made that the jury was selected by the sheriff and that the sheriff and his deputies were the principal witnesses in the case. It is also insisted that after the jury had retired to consider their verdict and after the court and the defendant had left the court room, that the state's attorney wrote a form of the verdict which he sent to the jury room without leave of the court. We have examined the record for any evidence of either of these errors. Nothing appears in the evidence as to the manner in which the jury was selected, and no complaint was made to the trial court on this point. The motion for a new trial contains an assignment of error as to the action of the state's attorney but there is nothing in the record to show that the state's attorney sent a form of a verdict to the jury after they had retired. If plaintiff in error desired to question the manner in which the jury was selected he should have done so by proper motion and given the court an opportunity to pass upon the objection. If there was any misconduct on behalf of the state's attorney out of the presence of the court it should have been called to the attention of the court by proper affidavits. Because of the fact that this was not done there can be no error assigned in this court.

It is also complained that certain evidence was improperly admitted and that the judgment is excessive. We find no error in the admission of evidence. The judgment as rendered is within the provisions of the statute and was within the sound legal discretion of the trial court and this court will not interfere on that ground.

There is no error in giving either of them. The ninth instruction told the jury how they should weigh the testimony of plaintiff in error. It has been approved on many occasions. Miller vs. The People, 227 Ill. 378; People vs. Seabak, 245 Ill. 438; People vs. Harrison, 261 Ill. 517; People vs. Dougherty, 266 Ill. 430; People vs. Taylor, 280 Ill. 234; People vs. Maciejewski, 294 Ill. 390. There was no error in any of the instructions given or refused. It is next insisted that the verdict was the result of passion and prejudice, and complaint is made that the jury was selected by the sheriff and that the sheriff and his deputies were the principal witnesses in the case. It is also insisted that after the jury had retired to consider their verdict and after the court and the defendant had left the court room, that the state's attorney wrote a form of the verdict which he sent to the jury room without leave of the court. We have examined the record for any evidence of either of these errors. Nothing appears in the evidence as to the manner in which the jury was selected, and no complaint was made to the trial court on this point. The motion for a new trial contains an assignment of error as to the action of the state's attorney but there is nothing in the record to show that the state's attorney sent a form of a verdict to the jury after they had retired. If plaintiff in error desired to question the manner in which the jury was selected he should have done so by proper motion and given the court an opportunity to pass upon the objection. If there was any misconduct on behalf of the state's attorney out of the presence of the court it should have been called to the attention of the court by proper objection. Because of the fact that this was not done there can be no error assigned in this regard. It is also complained that certain evidence was improperly admitted and that the judgment is excessive. We find no error in the admission of evidence. The judgment as rendered is within the provisions of the statute and was within the sound legal discretion

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

THE UNITED STATES OF AMERICA
DO hereby certify that the following is a true and correct copy of the original as the same appears on file in the Department of the Interior.

Approved:
Secretary of the Interior

Witness my hand and the seal of the Department of the Interior at Washington, D.C., this 1st day of January, 1900.

1900

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20-1-1900

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RECORDED

1900

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 1st day of
July in the year of our Lord one thousand
nine hundred and twenty five

Justus L. Johnson
Clerk of the Appellate Court.

JONES, President Justice.

TARTLOW, Justice.

LETT, Justice.

288 A. 840

George Woomer,

appellee,

vs.

Appeal from the Circuit Court

of Ogle County.

Martin Dirksen,

appellant.

238 I.A. 640

Partlow, J.

Appellee, George Woomer, began suit before a justice of the peace in Ogle county against appellant, Martin Dirksen, to recover damages to an automobile caused by a collision. There was a judgment for appellant, and an appeal to the circuit court of Ogle county, where there was a trial by jury, verdict for \$198.00 in favor of appellee, and a further appeal has been prosecuted to this court to review the judgment entered upon the verdict.

The collision occurred on the Lincoln highway about two or three miles west of Rochelle, Illinois, between ten and eleven o'clock on the morning of August 26, 1924. Lincoln highway extends east and west and has an eighteen foot concrete pavement with a black line down the center. At the point of the accident, it is intersected by a north and south dirt road which was rough owing to recent rains and heavy hauling of grain upon it. The day was warm and the sun was shining. Appellee and his wife were going east on Lincoln highway in a Dodge touring car. Appellant was going north on the dirt road in an Overland touring car. About three hundred feet west of the intersection on the Lincoln highway, there was a sign bearing the words "Caution - Side Road," or "Look - Cross Road." South of the intersection about three hundred feet on the dirt road was a sign bearing the words "Danger - State Road." On the south side of the Lincoln highway, west of the intersection, there was a growth of bushes, weeds, shrubs and trees which obstructed the view to some extent. It appears however, that there were one or more places in this obstruction where there were gaps so that one road could be seen from the other.

April Term, 1935.

Appeal from the Circuit Court

of Ogle County.

Appellee,

vs.

Appellant.

238 I.A. 640

Justice, J.

Appellee, George Woerner, began suit before a Justice of the Peace in Ogle County against appellant, Martin Dinkman, to recover damages to an automobile caused by a collision. There was a judgment for appellant, and an appeal to the Circuit Court of Ogle County. There was a trial by jury, verdict for \$100.00 in favor of appellee, and a further appeal has been presented to this court to review the judgment entered upon the verdict.

The collision occurred on the Lincoln Highway about 700 or 800 miles west of Rockford, Illinois, between ten and eleven o'clock on the morning of August 26, 1934. Lincoln Highway extends east and west and has an eighteen foot concrete pavement with a black line down the center. At the point of the accident, it is intersected by a north and south dirt road which was rough owing to recent rains and heavy hauling of grain upon it. The day was warm and the sun was shining. Appellee and his wife were going north on Lincoln Highway in a Dodge touring car. Appellant was going north on the dirt road in an Overland touring car. About three hundred feet west of the intersection on the Lincoln Highway, there was a sign bearing the words "Caution - Slow Down - or Look - Slow Down". West of the intersection about three hundred feet on the dirt road was a sign bearing the words "Danger - State Road". On the north side of the Lincoln Highway, west of the intersection, there was a growth of bushes, weeds, shrubs and trees which obstructed the view to some extent. It appears, however, that there was no car or truck passing in this direction when these facts were established.

There is the usual conflict in the evidence as to the rate of speed of the cars and as to the other facts attending the collision. Appellee testified he saw the road sign west of the intersection. After he passed the sign he took his foot off of the accelerator and coasted along looking both ways. He was going about twenty miles per hour. As he came to the intersection he saw a truck standing on the north side of the road. He saw no automobile coming from the south. When he was thirty feet from the intersection, appellant's car shot out right in front of him. He tried to go around it by turning to the left. He thought appellant's car was going to turn to the right on the pavement and that he could get around it. He testified he could have gone the other way but did not have room to turn. He tried to stop - put on the emergency and foot brakes, and slid the tires ten feet or more. It was impossible to see anything on the cross road to the right. He could see across the field but could not tell there was a cross road. He could not see any road unless he had been familiar with the country; that he could have seen a motor vehicle if he had looked for one. When he was ten feet from appellant's car he put on his brakes. When the cars collided he was on the left side of the road, not completely, but just about. His right wheels were on the black line in the center of the road. His car struck appellant's car in the middle of the left side, or a little behind the middle.

George E. Onley testified for appellee that appellant's car was going fifteen or twenty miles per hour; that from a point twenty-five feet south of the intersection the view was obstructed from the west; that the car from the west was going fifteen or twenty miles per hour. From the highway you could see a car approaching from the south about a block down, but the ordinary driver would probably never look at a car coming from the south.

George Manning testified for appellee that when he drove down on the road to the south there was no growth from Lincoln highway to the fence, then for a block down there was a growth of vegetation, and then there was a little gap about a block down where you could see the highway.

Appellant testified that on the day in question the south road was so rough he could not drive over fifteen miles per hour. To his left he could see Lincoln highway. He saw appellee's car when he was ten rods from the intersection. He later testified he could see it when it was thirty rods from the intersection. When he started to cross the highway he slowed down to five miles per hour and looked to the left. When appellee's car struck him, part of his car was north of the black line. His car was struck about the middle and was pushed over to an abutment on the north side of the highway. When his car stopped it was against the abutment about fifteen or eighteen feet from where it was struck. When he first saw appellee's car it was going thirty-five or forty miles per hour. He thought he had plenty of room to get past provided appellee stayed on the right side of the road.

James L. Wilson testified for appellant that appellant's car landed on the northeast corner of the intersection, east of the center of the north and south road, touching the cement abutment; that on the cement pavement you could see where the brakes on appellee's car had been applied. There were rubber marks on the pavement where the wheels had slid and these marks were from twenty to thirty feet long. They were on the right hand side of the black line as the car went east and they then swerved to the left of the intersection. From the place where the two cars collided to where appellant's car was after the accident was about twenty-three feet.

F. E. Bacon, a motor policeman, testified that after the accident appellant's car stood about a foot from the abutment at the northeast corner of the intersection. On the pavement you could see where appellant's car had been pushed sidewise about twelve or fifteen feet off of the cement. You could see where the tires of appellee's car had slid about the same distance; that these marks started from the middle of the black mark on the pavement and went to the left or north side of the road.

George Leonard testified he was driving some cattle along the

There is the first collision in the

Appellant testified that on the day in question the north road was in use, he could not drive over fifteen miles per hour. To his left he could see Lincoln Highway. He saw appellee's car when he was ten rods from the intersection. He later testified he could see it when it was thirty rods from the intersection. When he started to cross the highway he slowed down to five miles per hour and looked to the left. When appellee's car struck him, part of his car was north of the black line. His car was struck about the middle and was pushed over to an abutment on the north side of the highway. When his car stopped it was against the abutment about fifteen or sixteen feet from where it was struck. When he first saw appellee's car it was going thirty-five or forty miles per hour. He thought he had plenty of room to get past provided appellee stayed on the right side of the road.

James L. Wilson testified for appellant that appellee's car landed on the northeast corner of the intersection, east of the center of the north and south road, touching the cement abutment; that on the cement pavement you could see where the brakes on appellee's car had been applied. There were rubber marks on the pavement where the wheels had slid and these marks were first twenty to thirty feet long. They were on the right hand side of the road. As the car went east and they then answered to the left of the intersection. From the place where the two cars collided to where appellee's car was after the collision was about twenty-three feet. Y. L. Lewis, a water policeman, testified that after the collision appellee's car stood about a foot from the abutment at the northeast corner of the intersection. In the pavement you could see where appellee's car had been parked relative about twice or fifteen feet off of the cement. You could see where the tires of appellee's car had slid about the same distance; that these marks started from the middle of the black mark on the pavement and went to the left on the north side of the road.

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highway. The car from the west was going about thirty to thirty-five miles per hour. When he saw the car from the west it was about thirty rods away.

Grant Musselman testified that he was about one hundred feet north of the Lincoln highway. There were tire marks on the pavement which were examined by him and Bacon. They were twenty feet long, possibly more. He went down the road to the south after the accident and testified that if you were driving north on that road it would be possible to see a car on the Lincoln highway but the view was not clear.

Section 33 of the Motor Vehicle Act provides that "all vehicles travelling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." Under this section appellant had the right of way, and the evidence is undisputed that appellant reached the intersection before appellee. It was the duty of appellee to give the right of way to appellant. This appellee did not do. Appellee admits he was driving his car at least twenty miles per hour, and appellant put it as high as thirty-five or forty miles per hour. Appellee admits he saw the road sign three hundred feet west of the intersection. He testified he slowed down after he saw this sign, yet it is apparent that he still was travelling at such a rate of speed that when he struck appellant's car his wheel slid from ten to twenty-three feet and he knocked appellant's car that distance. He certainly was travelling at a considerable rate of speed in order to have accomplished that result.

There is some conflict as to whether the view was so ~~obstruct~~ obstructed that cars could not see each other from the two roads. Appellant testified he saw appellee's car. If appellant saw appellee's car it is difficult to understand why appellee did not see appellant's car if he had looked. At the time of the collision appellant's car was partly, at least, on the north side of the black line in the center of the pavement. This tends to show that if appellee had been driving his car at a reasonable rate of speed he

highway. The car from the west was going about thirty to thirty-five miles per hour. When he saw the car from the west it was about five miles per hour. The car from the east was going about thirty to thirty-five miles per hour.

Grant Massman testified that he was about one hundred feet north of the Lincoln highway. There were five cars on the pavement which were examined by him and Nelson. They were twenty feet long, possibly more. He went down the road to the south after the accident and testified that if you were driving north on that road it would be possible to see a car on the Lincoln highway but the view was not clear.

Section 38 of the Motor Vehicle Act provides that "all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." Under this section appellant had the right of way, and the evidence

is undisputed that appellant reached the intersection before appellee. It was the duty of appellee to give the right of way to appellant. This appellee did not do. Appellee admits he was driving his car at least twenty miles per hour, and appellant put it as high as thirty-five or forty miles per hour. Appellee admits he saw the road about three hundred feet west of the intersection. He testified he slowed down after he saw this sign, yet it is apparent that he still was traveling at such a rate of speed that when he struck appellant's car his wheel slid from ten to twenty-three feet and he knocked appellant's car that distance. He certainly was traveling at a considerable rate of speed in order to have accomplished that result.

There is some conflict as to whether the view was so obstructed that cars could not see each other from the two roads. Appellant testified he saw appellee's car. If appellant saw appellee's car it is difficult to understand why appellee did not see appellant's car if he had looked. At the time of the collision appellant's car was going, at least, on the north side of the block

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could have been able to have continued east on the right hand side of the road and not have struck appellant's car, as there was a distance of nine feet from the black line to the south line of the pavement. It was not only the duty of appellant to drive his car with due care and caution, but it was also the duty of the appellee to exercise due care and caution for his own safety and the safety of his car. Even if appellant was guilty of negligence, and appellee was not in the exercise of due care, he cannot recover.

Knott vs. Fry, 227 Ill. App. 615, involved questions quite similar to those here presented and after quoting Section 33 of the Motor Vehicle Law, this court said: "Under this section it was the duty of the appellee to give the right of way to appellant's car. This appellee did not do and from our view of the evidence he made no effort whatsoever to respect the right of way which appellant had at that particular time. Under these facts in this case as shown by the evidence, appellee was running his car at a high rate of speed with total disregard to the rights of the appellant. The accident seems to have been caused solely by the negligence of the appellee". So in this case, we are of the opinion that the evidence shows such a want of care on behalf of the appellee as requires a reversal of this judgment.

It is insisted that there is no proper evidence to sustain the damages because of the failure to prove the condition of the car of appellee prior to the accident. We do not think there is any merit in this contention. The evidence shows that the car was in good running order prior to the accident, and that the injuries complained of were the result of the accident.

For these reasons the judgment will be reversed and the cause remanded.

Reversed and Remanded.

...have been able to have continuous contact on the right hand side
of the road and not have struck appellant's car, as there was a
distance of nine feet from the black line to the south line of the
road. It was not only the duty of appellant to drive his car
within the lane and within, but it was also the duty of the appellee
to maintain his car within the lane and within the lane. Even if
appellant was guilty of negligence, and appellee was not in the exercise of due care, he cannot recover. The
court in this case, 232 Ill. App. 616, involved questions quite similar
to those here presented and after quoting Section 35 of the
Illinois Motor Vehicle Law, this court said: "Under this section it was the
duty of the appellee to give the right of way to appellant's car.
The appellee did not do so and from only view of the evidence he made
no effort whatsoever to respect the right of way which appellant had
at that particular time. Under these facts in this case as shown by
the evidence, appellee was running his car at a high rate of speed
with total disregard to the rights of the appellant. The accident
therefore, have been caused solely by the negligence of the appellee."
In this case, we are of the opinion that the evidence shows such
a want of common sense as to constitute a negligence.
It is stated that there is no proper evidence to sustain the
charge of the failure to prove the condition of the car or
any other factor to the accident. We do not think there is any merit
in this contention. The evidence shows that the car was in good
condition prior to the accident, and that the injuries complained
of were the result of the accident.
The court in this case, 232 Ill. App. 616, involved questions quite similar
to those here presented and after quoting Section 35 of the
Illinois Motor Vehicle Law, this court said: "Under this section it was the
duty of the appellee to give the right of way to appellant's car.
The appellee did not do so and from only view of the evidence he made
no effort whatsoever to respect the right of way which appellant had
at that particular time. Under these facts in this case as shown by
the evidence, appellee was running his car at a high rate of speed
with total disregard to the rights of the appellant. The accident
therefore, have been caused solely by the negligence of the appellee."
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charge of the failure to prove the condition of the car or
any other factor to the accident. We do not think there is any merit
in this contention. The evidence shows that the car was in good
condition prior to the accident, and that the injuries complained
of were the result of the accident.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 1st day of
July in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

1817 JAMES WILSON, Clerk of the Appellate Court,
of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the within and foregoing is a true and
correct copy of the original as the same appears from the
records of the Appellate Court in

and after the said
day of
1817

abstract only

7498

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 641¹

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Opinion slightly modified &
rehearing Denied Sept. 26, 1925

The Second District

Presiding Justice

H. AUGUSTUS A. PARTLOW, Chief Justice

Clerk

J. WETTER, Sheriff

Herman P. Baker,
appellant,

vs.

Appeal from the Circuit Court
of Henry County.

Bert H. Minks,
appellee.

238 I.A. 641

Partlow, J.

Appellant, Herman P. Baker, began suit against appellee, Bert H. Minks, before a justice of the peace in Henry county, to recover the value of about \$40.00 worth of electric light fixtures which appellee removed from a flat owned by appellant and which was occupied by appellee as a tenant. In the justice's court there was a judgment against appellant and an appeal was prosecuted to the circuit court of Henry county. Upon a trial before the court and a jury, the court directed a verdict in favor of appellee, and this appeal followed.

On April 3, 1923, appellant purchased from Rudolph Albrecht a flat building in Kewanee, Illinois. At The time of the purchase and for some time prior thereto, appellee had occupied, as a dwelling, a four room apartment on the second floor, and he continued to occupy it as a tenant of appellant for over a year after the sale. Appellee claims that during his tenancy with Albrecht he replaced, at his own expense, three electric fixtures in his apartment, under an agreement with Albrecht that they were to remain the personal property of appellee, that they were not to become a part of the real estate, and that appellee was to have the right to remove them at the end of his tenancy. Appellant did not investigate the conditions in the flat prior to his purchase, and never saw the inside of it, or talked with appellee about it until about a month after the sale, when appellee told appellant of the agreement which appellee had with Albrecht. On April 1, 1924, appellee removed from the premises and, over the objection of appellant, took the three fixtures with him, but replaced them with the fixtures which were in the apartment when

Herman P. Baker,

Appellant,

Appeal from the Circuit Court

vs.

of Henry County.

W. M. Wink,

Appellee.

238 I.A. 641

Verdict, 1.

Appellant, Herman P. Baker, began suit against appellee, W. M. Wink, before a Justice of the Peace in Henry County, to recover the value of about \$20.00 worth of electric light fixtures which appellee removed from a flat owned by appellant and which was occupied by appellee as a tenant. In the Justice's court there was judgment against appellant and an appeal was prosecuted to the circuit court of Henry County. Upon a trial before the court and a jury, the court directed a verdict in favor of appellee, and this appeal followed.

On April 3, 1937, appellant purchased from W. M. Wink a flat building in Lawrence, Illinois. At the time of the purchase and for some time prior thereto, appellee had occupied, as a dwelling, a front room apartment on the second floor, and he continued to occupy it as a tenant of appellant for over a year after the sale. Appellee remained during his tenancy with appellant he remained, at his own request, three electric fixtures in his apartment, under an agreement with appellant that they were to remain the personal property of appellee, that they were not to become a part of the real estate, and that appellee was to have the right to remove them at the end of his tenancy. Appellant did not investigate the condition in the flat prior to his purchase, and never saw the fixtures or the electric fixtures until after it was sold. A month after the sale, when appellee told appellant of the agreement which appellee had with appellant. On April 1, 1938, appellee removed from the premises and over the objection of appellant, took the electric fixtures with him.

appellee became a tenant. To redover the value of these three fixtures appellant began suit.

At the trial before the justice, and in the trial in the circuit court, it was contended by appellant that the fixtures were real estate, and he admitted that if they were not real estate he had no standing in court and the judgment should be for appellee. He does not dispute appellee's contention that appellee placed these fixtures in the premises and that at the time he placed them there he had a right to remove them at the end of his tenancy, but appellant claims that after the premises were sold, any agreement between Albrecht and appellee was not binding on appellant. The appellee claims the fixtures were personal property, and even though they were not personal property under ordinary circumstances, he had a right to remove them because they belonged to him as the tenant, first of Albrecht and later of appellant.

Articles attached to the soil will be considered as a part of the real estate as between an executor and heir, or a vendor and vendee, or a mortgagor and mortgagee, while as between landlord and tenant they may be considered as personal property. In other words, the rule is much more strict in the first class of cases than it is between landlord and tenant, and the courts have been much more liberal in permitting tenants to remove from the premises fixtures which would otherwise be construed as real estate than they have been in permitting other parties to remove them where a different relation existed. Kelly vs. Austin, 46 Ill. 156; Owings vs. Estes, 256 Ill. 553; Fehr Construction Company vs. Postal System, 288 Ill. 634; Gunderson vs. Kennedy, 104 Ill. App. 117; 26 Corpus Juris, 895. Some of the cases cited by appellant are not cases where the relation of landlord and tenant exist and for that reason they are not applicable to the facts here presented.

There are three tests generally applied by the courts as to the character of fixtures and as to their being removable. First, actual annexation to the realty, or something appurtenant thereto; second,

...appeals become a tenant. To recover the value of these three fix-
tures appellant began suit.
At the trial before the justice, and in the trial in the cir-
cuit court, it was contended by appellant that the fixtures were real
estate, and he admitted that if they were not real estate he had no
standing in court and the judgment should be for appellee. He does
not dispute appellee's contention that appellee placed these fixtures
in the premises and that at the time he placed them there he had a
right to remove them at the end of his tenancy, but appellant claims
that after the premises were sold, any agreement between Albrecht
and appellee was not binding on appellant. The appellee claims the
fixtures were personal property, and even though they were not per-
sonal property under ordinary circumstances, he had a right to remove
them because they belonged to him as the tenant, first of Albrecht
and later of appellant.
Articles attached to the soil will be considered as a part of
the real estate as between an executor and heir, or a vendor and
vendee, or a mortgagor and mortgagee, while as between landlord and
tenant they may be considered as personal property. In other words,
the rule is much more strict in the first class of cases than it is
between landlord and tenant, and the courts have been much more
liberal in permitting tenants to remove from the premises fixtures
which would otherwise be considered as real estate than they have
been in permitting other parties to remove them where a different
relation existed. Kelly vs. Austin, 46 Ill. 156; Owens vs. Bates,
288 Ill. 555; Fehr Construction Company vs. Postal System, 288 Ill.
124; Hamilton vs. Kennedy, 104 Ill. App. 117; 26 Corpus Juris, 896.
Some of the cases cited by appellant are not cases where the relation
of landlord and tenant exist and for that reason they are not appli-
cable to the facts here presented.
There are three tests generally applied by the courts as to the
character of fixtures and as to their being removable. First, actual

application to the use or purpose to which that part of the realty with which they are connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freeholder. The latter test appears to be the principal one, and in cases of doubt, the intention of the parties must control. *Sword vs. Low*, 122 Ill. 487; *Fifield vs. Farmers National Bank*, 148 Ill. 163; *Ward vs. Earl*, 86 Ill. App. 635; *Washburn on Real Property*, 5th Ed. Chap. 1, Sec. 18.

While parties may not, by a contract, make personal property real or personal at will, yet when an article, personal in its nature, is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern, and if there is an express agreement that it shall remain personal property, or if, from the attending circumstances, it is evident or may be presumed that such was the intention of the parties, such article will be held to have retained its personal character even as against subsequent purchasers or encumbrancers. *Sword vs. Low*, supra. In 8 *American & English Encyclopedia of Law*, page 44, it is said; "Many cases hold that the intention of the party making the annexation is the chief element to be considered in determining what are fixtures." Citing many cases, including *Jones vs. Ramsey*, 3 Ill. App. 303. In *Taylor on Landlord and tenant*, 8th Ed. Vol. 2, Sec. 544, it is said; "In modern times, the rule is understood to be that upon principles of general policy, a tenant, whether for life, for years, or at will, is presumed to carry away all such fixtures of a chattel nature as he himself has erected upon the demised premises for the purpose of ornament, domestic convenience, or to carry on trade, provided the removal can be effected without material injury to the freeholder."

In *Chapman vs. Union Mutual Life Insurance Co.*, 4 Ill. App. 29, it was held that chandeliers, lamps, and brackets attached to gas pipes in the usual way are not fixtures but are personal property. In *Raymond vs. Strickland*, 124 Ga. 604; 3 *L.R.A.* 69; there was the same holding

application to the use or purpose to which that part of the realty
with which they are connected is appropriated; and third, the inten-
tion of the parties making the annexation to make a permanent accession
to the freehold. The latter test appears to be the principal one,
and in cases of doubt, the intention of the parties must control. *Sword*
vs. Lord, 122 Ill. 487; *Wiffeld vs. Farmers National Bank*, 148 Ill. 163;
Ward vs. Earl, 86 Ill. App. 685; *Washington on Real Property*, 5th Ed.
Chap. I, Sec. 18.
While parties may not, by a contract, make personal property real
or personal as will, yet when an article, personal in its nature, is
so attached to the realty that it can be removed without material in-
jury to it or to the realty, the intention with which it is attached
will govern, and if there is an express agreement that it shall remain
personal property, or if, from the attending circumstances, it is evi-
dently so, it may be presumed that such was the intention of the parties,
such article will be held to have retained its personal character even
as against subsequent purchasers or encumbrancers. *Sword vs. Lord*,
supra. In 8 American & English Encyclopedia of Law, page 44, it is
said: "Many cases hold that the intention of the party making the
annexation is the chief element to be considered in determining what
are fixtures." Citing many cases, including *Jones vs. Hensley*, 3 Ill.
App. 303. In *Taylor on Landlord and Tenant*, 4th Ed. Vol. 1, Sec. 211,
it is said: "In modern times, the rule is understood to be that upon
principles of general policy, a tenant, whether for life, for years,
or at will, is presumed to carry away all such fixtures of a chattel
nature as he himself has erected upon the demised premises for the
purpose of ornament, domestic convenience, or to carry on trade, pro-
vided the removal can be effected without material injury to the free-
hold." *Taylor on Landlord and Tenant*, 4th Ed. Vol. 1, Sec. 211.
In *Chicago vs. Union Mutual Life Insurance Co.*, 4 Ill. App. 29,
it was held that chandeliers, lamps, and pictures attached to the premises
in the hotel were not fixtures but were personal property. In *Chicago*

with reference to electric light chandeliers. In 2 Devlin on Deeds, page 2309, it is said: "The weight of authority in this country is to the effect that gas fixtures secured into the gas pipes of a building are chattel and do not pass by deed to the premises." To the same effect are 26 Corpus Juris, 725; Rogers vs. Coon, 40 Mo. 91; Vaughn vs. Holderman, 33 Pa. St. 552.

It is conceded by appellant that the fixtures in question were put into this apartment by appellee under an agreement with Albrecht that they should remain personal property and that appellee should have the right to remove them at the end of his tenancy. Under authority of Sword vs. Low, supra, such articles will be held to have retained their personal character even as against subsequent purchasers or encumbrancers. The evidence shows that the fixtures could be removed without any damage to the building, and that they were replaced with the fixtures which were in the building at the time appellee took possession. ~~At the time the building was sold appellee was in possession of his apartment and his possession was notice to appellant of all his rights as a tenant, including his agreement with Albrecht. Williams vs. Brown, 14 Ill. 200; Coari vs. Olson, 91 Ill. 278.~~ Under the authorities the fixtures remained personal property and appellee had the right to remove them.

It is next contended by appellant that the court improperly directed a verdict. The rule is well settled that where there is any evidence fairly tending to support the plaintiff's cause of action that the court is without authority to direct a verdict. The facts in this case are practically conceded. The only contention is as to the law applicable to the facts. Under the facts there was no evidence fairly tending to support appellant's cause of action and for that reason the court properly directed a verdict.

The point is made by appellee that there is no evidence even tending to establish the proper measure of damages. We do not deem it necessary to consider that question as what we have already said will probably entirely dispose of the case.

with reference to electric light chandeliers. In *Devlin on Deeds*,
page 2309, it is said: "The weight of authority in this country is to
the effect that gas fixtures secured into the gas pipes of a building
are chattel and do not pass by deed to the premises." To the same
effect are *25 Corpus Juris*, 735; *Rogers vs. Coon*, 40 Mo. 31; *Vaughn*
vs. Holbourn, 33 Pa. St. 552.
It is contended by appellant that the fixtures in question were
put into this apartment by appellee under an agreement with Albrocht
that they should remain personal property and that appellee should
have the right to remove them at the end of his tenancy. Under author-
ity of *Sword vs. Low*, supra, such articles will be held to have re-
tained their personal character even as against subsequent purchasers
or encumbrancers. The evidence shows that the fixtures could be re-
moved without any damage to the building, and that they were replaced
with the fixtures which were in the building at the time appellee took
possession.
~~It is contended by appellant that the fixtures were not secured into the gas pipes of the building at the time of his possession, but that they were placed there by the defendant, and that they were not secured into the gas pipes of the building at the time of his possession.~~
~~It is contended by appellant that the fixtures were not secured into the gas pipes of the building at the time of his possession, but that they were placed there by the defendant, and that they were not secured into the gas pipes of the building at the time of his possession.~~
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authorities the fixtures remained personal property and appellee had
the right to remove them.
It is next contended by appellant that the court improperly direct-
ed a verdict. The rule is well settled that where there is any evidence
fairly tending to support the plaintiff's cause of action that the court
is without authority to direct a verdict. The facts in this case are
materially conceded. The only contention is as to the law applicable
to the facts. Under the facts there was no evidence fairly tending to
support appellant's cause of action and for that reason the court pro-
perly directed a verdict.
The point is made by appellee that there is no evidence even tend-
ing to establish the proper measure of damages. He is not to be
assumed to consider that question as that he has already said will

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

. L'articolo 25 dell'articolo 25 del presente regolamento è da intendersi come segue:

• *Journal of the American Medical Association*

10076

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
n and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk of the Appellate Court,
the State of Illinois, and keeper of the Records and Seal thereof,
of the opinion of the said Appellate Court in

I do hereby set my hand
Given, this 10th day of
the year of our Lord one thousand

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 641²

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 15 1925

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

HON. NORMAN T. JONES, President Justice.

HON. AUGUSTUS A. PARTLOW, Justice.

ORDERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
United States Court in the words and figures

Louis M. Koren,

appellee,

vs.

Appeal from the County Court
of Peoria County.

Alliance Insurance Company of
Philadelphia, Pennsylvania,
a corporation,

appellant.

238 I.A. 641

Partlow, J.

This is an appeal from a judgment for \$950. in favor of appellee, Louis M. Koren, against appellant, Alliance Insurance Company of ~~Hi~~ Philadelphia, rendered in the county court of Peoria county upon a default on an insurance policy for the theft of an automobile.

On August 8, 1922, appellant issued a policy to appellee on a Buick automobile. The policy was to run from August 3, 1922, for one year. Appellee claims that on the night of August 2, 1923, one day before the policy expired, his automobile was stolen from the streets of Peoria. On July 1, 1924, he filed a praecipe for a summons, and the summons was served the next day. No declaration was filed to the October term of court. On November 14, 1924, a so called declaration was filed which was not signed at the bottom either by appellee or any one as his attorney. There was an endorsement of the name of the attorney, in his handwriting, on the back of the declaration next to the file mark of the county clerk. The declaration alleged that the policy was issued August 8, 1922; that it went into effect at noon on August 3, 1923, standard time, and that it expired on August 3, 1923; that it was countersigned at Chicago on August 8, 1922, while at another place it was alleged that it was issued on August 8, 1923; that suit was to be brought within twelve months of the date of the loss; that on August 2, 1923, the automobile was stolen. On December 2, 1924, which was the second day of the December term, appellant was defaulted for want of a plea. On December 8, 1924, appellant entered a limited appearance and filed a written motion supported by an affidavit to set aside the default. The motion was upon the ground that

Louis W. Jones,

Appellant,

vs.

Alliance Insurance Company of
Philadelphia, Pennsylvania,
a corporation,

Appellee.

Appeal from the County Court
of Berks County.

2381.A. 641

Verdict, 1.

This is an appeal from a judgment for \$1000. in favor of appellee.
Louis W. Jones, against appellant, Alliance Insurance Company of
Philadelphia, rendered in the county court of Berks County upon a
verdict on an insurance policy for the theft of an automobile.

On August 8, 1933, appellant issued a policy to appellee on a
new automobile. The policy was to run from August 8, 1933, for one
year. Appellee claims that on the night of August 2, 1933, one day
before the policy expired, his automobile was stolen from the streets
of Pottsville. On July 1, 1934, he filed a praecipe for a summons, and
the summons was served the next day. No declaration was filed to the
proper term of court. On November 14, 1934, a so called declaration

was filed which was not signed at the bottom either by appellee or
by any of his attorneys. There was an endorsement of the name of the
attorney, in his handwriting, on the back of the declaration and he
also filed with the county clerk. The declaration alleged that the
policy was issued August 8, 1933; that it went into effect at noon
on August 8, 1933, and that it expired on August 8,
1934; that it was outstanding at Pottsville on August 2, 1933, while
the automobile was there; that it was issued on August 8, 1933;
that on August 2, 1933, the automobile was stolen. On December
8, 1934, which was the second day of the December term, appellant entered
a motion for judgment on the facts. On December 8, 1934, appellee entered
a written motion supported by an affidavit.

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appellee had failed to file a declaration ten days before the first day of the second term of court; that the purported declaration did not state a cause of action; that the appellant had a meritorious defense, and had been diligent. The affidavit in support of the motion alleged that the appellant had been guilty of no negligence or laches; that application was made to set aside the default at the earliest opportunity; that appellant did not plead to the purported declaration for the reason it did not state a cause of action, and was not a declaration; that the attorney for appellant was prevented from appearing in court and moving to dismiss the case on the grounds that no declaration had been filed ten days before the first day of the second term of court, because said attorney was the only attorney in the case, and from December 1 to 4, he was engaged before the circuit court and before the Industrial Commission of Illinois; that appellee failed to file notice of the alleged loss as required by the policy within sixty days of the date thereof; that the automobile described in the policy was not the automobile which was stolen, and that there were other defenses on the merits. The affidavit was sworn to on information and belief. The motion to set aside the default was denied, whereupon appellee testified that he was the owner of a car on August 8, 1922; that he bought it on February 25, 1922, for \$1000. and it was the car insured by the policy; that it was stolen August 8, 1923. He afterwards testified it was stolen August 2, 1923; that he reported the theft to the police and gave written notice to appellant within sixty days, and that the car, at the time it was stolen, was fairly and reasonably worth \$1000. Judgment was thereupon entered against appellant for \$950. On December 9, 1924, appellant entered another limited appearance and filed a written motion to set aside the judgment on substantially the same grounds as set out in his motion to set aside the default, and, in addition thereto, alleged that the purported declaration did not allege that written notice was given by appellee, or that the policy was in effect on the date of the loss; that the purported affidavit of claim was not signed or subscribed by appellee, or his attorneys, or verified, as required by the statute. The

...has failed to file a declaration for such before the first
of the second term of court; that the defendant has failed to
take a notice of setting aside the judgment as a matter of course,
and has been negligent. The affidavit in support of the motion alleged
that the defendant had been guilty of no negligence or fault; that
the defendant was made to set aside the judgment of the court upon
the ground that the judgment was filed in the court before the
first day of the second term of court, and was not a matter
of course. That the attorney for appellant was prevented from appearing in
court and moving to dismiss the case on the grounds that no declara-
tion had been filed ten days before the first day of the second term
of court, because said attorney was the only attorney in the case,
and from December 1 to 4, he was engaged before the circuit court and
before the District Court of Illinois; that appellee failed
to file a notice of setting aside the judgment of the court within
the time of the law thereon; that the automobile described in the
affidavit was not the automobile which was stolen, and that there were
other automobiles on the market. The affidavit was sworn to on informa-
tion and belief. The motion to set aside the judgment was denied.
Appellee testified that he was the owner of a car on August
1, 1932, that he bought it on February 25, 1932, for \$1000. and it was
insured by the policy; that it was stolen August 6, 1932. He
thereupon testified it was stolen August 2, 1932, that he reported
the theft to the police and gave written notice to appellant within
fifty days, and that the car, at the time it was stolen, was fairly
worth \$1000. Judgment was thereupon entered against
appellant for \$500. On December 9, 1932, appellant entered another
written statement and filed a written motion to set aside the judgment
on the ground that the same was entered as set out in his motion to set
aside the judgment, and in addition thereto, alleged that the purported
statement was not signed by appellant and that written notice was given by appellee,
and that the policy was in effect on the date of the loss; that the

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affidavit filed in support of this motion was substantially the same as the affidavit filed in support of the motion to set aside the default and was upon information and belief. This motion was denied and an appeal was prosecuted to this court.

In addition to the grounds set out in the affidavit for reversing the judgment, it is claimed by appellant, that the service of the summons upon it was defective for the reason that the return on the summons does not show that it was read to appellant. Appellee contends that the signing of the declaration on the back by the attorney for appellee was sufficient; that the statute with reference to service upon incorporated companies does not require the reading of the summons to the officer served; that the affidavits in support of the motion to set aside the default and the judgment were insufficient because they were on information and belief; that the bill of exceptions does not state that it contains all the evidence; that no exceptions were taken to the judgment.

We do not deem it necessary to consider each of these objections in detail. It has been the established practice of the courts of this state to be liberal in setting aside defaults at the term at which they were entered when it appears that justice will be promoted thereby. City of Moline v. Chicago, Burlington & Quincy Railroad Company, 262 Ill. 52; McMurray v. Peabody coal Company, 281 Ill. 218; Hallin vs. Penny, 209 Ill. App. 230. If the question of setting aside this default and judgment ~~was~~ depended entirely upon any one of the points raised, we probably would not be justified in reversing the judgment, but there are so many defects in this proceeding that we feel that the court should have set aside the default and permitted the appellant to defend the suit.

The automobile was alleged to have been stolen on the day before the policy expired but suit was not begun for eleven months thereafter. No declaration was filed to the first term and the so called declaration filed to the second term was unsigned. Even if it be conceded that this unsigned document was a declaration, there are certain allegations in it which are indefinite, uncertain and conflicting, and at

affidavit filed in support of this motion was substantially the same as the affidavit filed in support of the motion to set aside the 50-
and was upon information and belief. This motion was denied and
an appeal was presented to this court.
In addition to the grounds set out in the affidavit for reversing
the judgment, it is claimed by appellant, that the service of the
process upon it was defective for the reason that the return on the
process does not show that it was read to appellant. Appellee contends
that the signing of the declaration on the back by the attorney for
appellee was sufficient; that the statute with reference to service
upon incorporated companies does not require the reading of the summons
to the officer named; that the affidavits in support of the motion
do not raise the details and the judgment were insufficient because
they were on information and belief; that the bill of exceptions does
not state that it contains all the evidence; that no exceptions were
taken to the judgment.
It is not deemed it necessary to consider each of these objections
in detail. It has been the established practice of the courts of this
State to be liberal in setting aside defaults at the term at which
they were entered. It appears that justice will be promoted thereby.
City of Chicago v. Chicago, Burlington & Quincy Railroad Company, 362
Ill. 52; McHenry v. Peabody Coal Company, 381 Ill. 218; Hallin v.
City, 381 Ill. App. 230. If the question of setting aside this de-
fault and judgment was depended entirely upon any one of the points
raised, we probably would not be justified in reversing the judgment.
But there are many defects in this proceeding that we feel that
the court should have set aside the default and permitted the appeal
to be taken the first time.
The automobile was alleged to have been stolen on the day before
the policy expired and suit was not begun for eleven months thereafter.
A declaration was filed to the first term and the so called declara-
tion filed to the second term was amended. Even if it be conceded

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least one material allegation is entirely omitted. The declaration alleged that the policy became effective on August 3, 1923, and expired on August 3, 1923, whereas, it became effective on August 3, 1922, and expired on August 3, 1923. This error appears not only as an allegation of the declaration, but it also appears in the haec verba copy of the policy which is made a part of the declaration and which is the basis of appellee's cause of action. There is no other allegation, either direct, or by inference, that the policy was in force and effect on the day the automobile was stolen. In *Carbonne vs. Pennsylvania Fire Insurance Company*, 222 Ill. App. 506, this court held that the declaration should show that the policy was in force at the time of the loss. We there held that it might be by positive averment, or it might be by inferences drawn from other allegations and these inferences might be sufficient when no direct attack was made upon the declaration. At one place in the declaration it is alleged that the policy was issued August 8, 1922, while in another place it avers that the policy was issued August 8, 1923. A default admits only the facts well pleaded and, if the facts alleged do not justify a recovery, final judgment should not be entered. *Schueler vs. Mueller*, 193 Ill. 402.

After the default was taken, counsel for appellant promptly moved to set it aside, which motion was overruled. Judgment was entered and he thereupon moved to set aside the judgment, making specific allegations as to the reasons therefor, including the allegation that the automobile stolen was not the automobile covered by the policy. If the automobile stolen was not the automobile covered by the policy, it was certainly error to render judgment against appellant therefor.

The evidence upon which the judgment was rendered consisted of the testimony of appellee. He testified, among other things, to the amount of his damages. He stated that the automobile was worth \$1000., but there was ~~not~~ no foundation laid for this evidence, there was no evidence showing his knowledge of values of automobiles and of the automobile in question.

~~We do not think there is any merit in the contention that the~~

least one material allegation is entirely omitted. The declaration
alleged that the policy became effective on August 3, 1933, and ex-
pired on August 3, 1933. Whereas, it became effective on August 3,
1933, and expired on August 3, 1935. This error appears not only as
an allegation of the declaration, but it also appears in the rec-
ords copy of the policy which is made a part of the declaration and
which is the basis of appellee's cause of action. There is no other
allegation, either direct, or by inference, that the policy was in
force and effect on the day the automobile was stolen. In *Carbone*
v. Pennsylvania Fire Insurance Company, 228 Ill. App. 506, this court
held that the declaration should show that the policy was in force
at the time of the loss. We there held that it might be by positive
avowment, or it might be by inference drawn from other allegations
and these latter ones might be sufficient when no direct attack was
made upon the declaration. At one place in the declaration it is
alleged that the policy was issued August 3, 1933, while in another
place it avers that the policy was issued August 3, 1935. A defendant
admits only the facts well pleaded and, if the facts alleged do not
justify a recovery, final judgment should not be entered. *Schneider v.*
Miller, 153 Ill. 402.
After the default was taken, counsel for appellant promptly moved
to set it aside, which motion was overruled. Judgment was entered and
appellant moved to set aside the judgment, making specific allega-
tions as to the reasons therefor, including the allegation that the
automobile stolen was not the automobile covered by the policy. If
the automobile stolen was not the automobile covered by the policy, it
was certainly error to render judgment against appellant therefor.
The evidence upon which the judgment was rendered consisted of
the testimony of appellee. He testified, among other things, to the
value of his baggage. He stated that the automobile was worth \$1000.
and there was no testimony in this evidence, there was no
evidence showing his knowledge of values of automobiles and of the
automobile in question.

We do not think there is any merit in the contention that the summons was not properly served, or that the return was insufficient. The certificate of the trial judge which omitted to state that the record contained all the evidence, is not material for the reason that the reversal of the judgment does not depend entirely upon the evidence. We do not hold that the affidavits in support of the motion to set aside the judgment and default were sufficient, being sworn to upon information and belief. The ground upon which this judgment is reversed is not for any one particular error, but for errors most of which appear on the face of the record and which were not necessary to be set up by affidavit.

For the reasons indicated, the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
July in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

THE UNIVERSITY OF CHICAGO

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Appellate Court in

and after several of

day of

year of our Lord one thousand

at Ottawa, this

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*Rehearing denied October 23, 1925
and opinion slightly modified.
Abstract only.*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 641³

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Joseph G. Rigg, Administrator
of the Estate of Raymond G. Rigg,
deceased,

appellee,

vs.

James Callahan and John Callahan,
appellants,

Appeal from the Circuit
Court of Lake County.

Jett, J.

238 I.A. 641

Since this cause was submitted, the death of John Callahan has been suggested and ~~leave given to substitute the name of Kathryn V. Callahan, Executrix of the last will and testament of John Callahan, deceased, as a party defendant.~~ *the action will proceed against the surviving defendant and the suit is dismissed as to Callahan, Executrix of the last will and testament of John Callahan, the said Kathryn V. Callahan.*

Shortly after the noon hour on August 17, 1922, Joseph G. Rigg, the father of Raymond G. Rigg, was driving his Buick touring car accompanied by his wife and other members of his family on a gravel road known as the Druce Road in Lake County. Alfred V. Larke, a brother of Mrs. Rigg, sat on the front seat at the right of the driver and upon his lap, with his back to the right hand door, sat the said Raymond G. Rigg, a boy thirteen years of age. As the automobile proceeded in a northerly direction a hay rack and team were seen approaching from the south and in order not to pass upon a culvert the driver of the car, first signalling his intention so to do, slowed down and stopped his car about thirty feet south of the culvert. The road was practically level and straight and at the place where the car stopped the gravel portion was thirteen feet wide with a grass shoulder on the east side of one and one half feet and on the west side of two feet in width. The team and the hay rack crossed the culvert and as it reached a point opposite where the touring car had stopped it turned to its right off the gravel road down a slight incline to a dirt road which was between the main gravel road and the fence. John C. Callahan, one of the appellants, was driving

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Court of Lake County.

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the author will proceed against the
unwilling defendant and the suit is dismissed as to
the plaintiff.

Shortly after the noon hour on August 17, 1935, Joseph G. Rice,

Father of Raymond G. Rigg, was driving his Buick touring car

...sponsored by his wife and other members of his family on a travel

known as the Bruce Road in Lake County. Alfred V. Jarke, a

... of Mrs. Rice, sat on the front seat at the right of the

river and upon his lap, with his back to the right hand boat.

Raymond G. Bitt, a pay thirteen years of age. As the auto-

...the ...

For a copy press of ten tabs at five cents each, write to the nearest post office.

...the driver of the car that attempted his attempt to do

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appellant's Reo truck loaded with two tons of ice and ice cream and according to his testimony he had been following the Buick car for approximately a mile, remaining about thirty to fifty feet in the rear and traveling at a speed of about twenty miles per hour. He testified that the hay rack was off on the side of the road when the touring car stopped in the middle of the road. That he saw the driver of the car signal his intention to stop and at that time he was fifty feet behind him and applied the brakes and had almost stopped his truck, when in order to avoid the ditch and team on his left side, his truck ran into the rear left hand side of the touring car and as a result thereof Raymond G. Rigg was thrown from the car and sustained the injuries from which he died. From a judgment in favor of the appellee for \$6500.00, appellants bring the record to this court for review.

As a result of the impact appellee's car was pushed north fully ninety feet before it stopped. Appellants' truck then came up and stopped alongside and as Mr. Rigg was leaving his car he inquired of the driver of the truck, "What was the matter with you?" and the reply was, "I was going so fast I could not stop." Mr. Rigg then left the car and went back to where the body of his son lay and while so doing appellant started his truck and moved it from the west side of the road over in front of appellee's car on the east side of the road and it was in this place after appellee had come back from the place where his son lay and after the body of the son had been placed in another car and after the return of the members of appellee's party to the truck of appellant that the driver of the truck, in reply to a question of Mrs. Riggs' as to why he had hit their car said, "With death staring me in the face I would rather hit your car than run in the ditch and risk my own life." And shortly thereafter in reply to a similar question of Mrs. Larke, appellant said, "Don't run around like maniacs, this is fully covered by insurance." The trial court over the objections of appellants permitted the several witnesses to detail these conversations and in this court appellants insist

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the touring car stopped in the middle of the road. That he saw the
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his truck ran into the rear left hand side of the touring car and as
a result thereof Raymond G. Rigg was thrown from the car and sustained
the injuries from which he died. From a judgment in favor of the
appellee for \$500.00, appellant brings the record to this court for
reversal.
As a result of the appellant's case was heard with fully
almost two hours before it started. Appellant's truck came up and
stopped alongside and as Mr. Rigg was leaving the car he indicated to
the driver of the truck, "What was the matter with your car and the way
was, "I was going so fast I couldn't stop." Mr. Rigg then left the
car and went back to where the wife of his son lay and while so do-
ing appellant started his truck and moved it from the rear side of
the team over to front of appellant's car on the east side of the road
and it was in this place after appellant had come back from the place
where his son lay and after the body of the son had been placed in
another car and after the return of the mother to appellant's car,
to the truck of appellant that the driver of the truck, in reply to
a question of Mrs. Rigg, as to why he had hit their car said, "With
leaving starting as in the case I would rather hit your car than run in
the ditch and risk my own life." And shortly thereafter in reply to
a similar question of Mrs. Burke, appellant said, "Don't run around
like this, this is fully covered by insurance." The trial court
over the objection of appellant admitted the several witnesses

that these statements were not a part of the res gestae, and that they do not explain, characterize or illustrate the act which was the subject of inquiry, were simply narrative of a past event and highly improper and prejudicial. Appellee insists that these several statements are a part of the res gestae; that they do explain and characterize in a very significant manner the entire transaction and were competent to show the mental state of declarant.

If these several statements were admissions against the interest of the declarant or if they were verbal acts illustrating, explaining or interpreting the transaction of which they were a part, then they were competent but if they were merely a history of a completed affair then the trial court erred in their admission. The Chicago West Division Ry. Co. v. Becker, 128 Ill. 545. The issue in this case was whether or not appellants were negligent as charged in the declaration. The declaration consisted of seven counts one of which charged that appellants carelessly and negligently operated and drove their truck at a greater rate of speed than was reasonable and proper. Another count charged them with negligently and carelessly driving their truck and their failure to turn to the left in attempting to pass the automobile in which deceased was riding. Two counts alleged a wilful and wanton operation of the truck by appellants and the other counts alleged general negligence and carelessness in the operation of the truck. The statement of appellant that he was going so fast he couldn't stop, was, in our opinion, properly admitted as a declaration against interest. The speed of the truck was a subject of inquiry upon the trial of this case and that answer was properly considered by the jury together with all the other evidence in the case on the question of how fast the truck was traveling at the time of the collision. The reason appellant gave for striking appellee's car was that he chose to have his truck hit it rather than to risk his own life by running into the ditch. This statement certainly characterized, interpreted and explained his driving and tested by all the authorities it was competent. It was not merely a narrative of a completed transaction but an explanation and reason why the

that these statements were not a part of the res gestae, and that they do not explain, characterize or illustrate the act which was the subject of inquiry, were simply narrative of a past event and highly improper and prejudicial. Appellee insists that these several statements are a part of the res gestae; that they do explain and characterize in a very significant manner the entire transaction and were competent to show the mental state of defendant.

If these several statements were admissions against the interest of the defendant or if they were verbal acts illustrating, explaining or interpreting the transaction of which they were a part, then they were competent, but if they were merely a history of a completed act, then the trial court erred in their admission. The issue in this case was whether or not appellants were negligent as charged in the declaration. The declaration consisted of seven counts one of which charged that appellants carelessly and negligently operated and drove their truck at a greater rate of speed than was reasonable and proper. Another count charged them with negligently and carelessly driving their truck and their failure to take all the necessary steps to prevent the automobile in which defendant was riding. The counts alleged a willful and wanton operation of the truck by appellants and the counts alleged general negligence and carelessness in the operation of the truck. The statement of appellant that he was going so fast he couldn't stop, was, in our opinion, properly admitted as a declaration against interest. The speed of the truck was a subject of inquiry upon the trial of this case and that answer was properly considered by the jury together with all the other evidence in the case on the question of how fast the truck was traveling at the time of the collision. The reason appellant gave for striking appellee's car was that he chose to have his truck hit it rather than to risk his own life by turning into the ditch. This statement certainly was relevant, interpreted and explained his driving and tested by all the evidence it was competent. It was not merely a narrative

collision took place. The admonition of appellant to Mrs. Larke and others not to run around like maniacs and cautioning the relatives not to get hostile and informing them that he was fully covered by insurance, if standing alone, were clearly incompetent. These statements of themselves threw no light upon the issues raised by the pleadings. It has frequently been held to be improper to intimate to the jury that the defendant was insured against liability or that the party which would have to respond to any verdict that might be rendered was an insurance company. Such facts are wholly irrelevant and to permit it to be shown that defendant will suffer no pecuniary loss by reason of a verdict against him but that the case is being defended by an insurance company, has been held to be error. Volkman vs. Brossman, 129 Ill. App. 182. The effect of the argument of appellants is that the natural result of the information which the jury received from this statement was that they would sustain no damage by a verdict against them, but that whatever judgment might be rendered was fully covered by insurance. This statement, however, was made and must be taken in connection with the other statements herein referred to, and when so taken we are not prepared to say that it did not characterize and explain the action of the driver of the truck in permitting his truck to strike appellee's car rather than run it into the ditch.

It can reasonably be deducted from these several statements that inasmuch as he was fully insured against collisions, he preferred to take the chance of striking appellee's car rather than risk his own life by running into the ditch. When the driver of the truck realized that the car in front of him had stopped and comprehended his own position and danger, there were two choices open to him. One to run his truck into the machine of appellee, the other to go into the ditch at his left with possibly more serious consequences to himself or his companion, or to his truck. He chose to collide with the car of appellee, and gave as his reason the fact that he was covered by insurance. This is substantially what he said, and when taken and

collisions took place. The admission of appellant to Mrs. Larke and others not to run around like maniacs and cautioning the relatives not to get hostile and informing them that he was fully covered by insurance, if standing alone, were clearly incompetent. These statements of themselves threw no light upon the issues raised by the pleadings. It has frequently been held to be improper to intimate to the jury that the defendant was insured against liability or that the party would have to respond to any verdict that might be rendered was an insurance company. Such facts are wholly irrelevant and to permit it to be shown that defendant will suffer no pecuniary loss by reason of a verdict against him but that the case is being determined by an insurance company, has been held to be error. Volman v. Frost, 129 Ill. App. 182. The effect of the argument of appellant is that the natural result of the information which the jury received from this statement was that they would sustain no damage by a verdict against them, but that whatever judgment might be rendered was fully covered by insurance. This statement, however, was made and must be taken in connection with the other statements herein referred to, and when so taken we are not prepared to say that it did not characterize and explain the action of the driver of the truck in permitting his truck to strike appellee's car rather than run it into the ditch. It can reasonably be deduced from these several statements that inasmuch as he was fully insured against collisions, he preferred to take the chance of striking appellee's car rather than risk his own liability running into the ditch. When the driver of the truck realized that the car in front of him had stopped and comprehended his own position and danger, there were two choices open to him. One to run his truck into the machine of appellee, the other to go into the ditch at his left with possibly more serious consequences to himself or his company, or to his truck. He chose to collide with the car of appellee, and gave as his reason the fact that he was covered by

considered in connection with all the other evidence in this record we are unable to say that reversible error was committed by permitting its introduction. Moreover, the worst that can be said in opposition to admitting this evidence, is that it was calculated to increase the damages. The damages are not excessive, nor is it argued that they are.

Complaint is also made of three instructions given the jury at the request of appellee. The objection to one of the instructions is that it was based on Section 22 of the Motor Vehicle Act, without stating what Section 22 provides. This instruction however, refers to the rate of speed as provided in that section, and in our opinion, no error was committed in giving it. It is not pointed out in what particular the other two instructions were erroneous and we are unable to perceive any error in giving either of them.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

Appel
us and Paul Thorne
Appellate Court in
of
Attix he said of

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 641⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 11 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

[The text on this page is extremely faint and illegible. It appears to be a list or a series of entries, possibly related to a historical or scientific study. The structure suggests a table with multiple columns, but the specific content cannot be discerned.]

Frank K. Duzenberg, Admr. of the
estate of Roy V. Duzenberg, deceased,

appellee,

Appeal from the Circuit Court

vs.

of Iroquois County.

The Cleveland, Cincinnati, Chicago &
St. Louis Railway Company,

appellant.

238 I.A. 641

Partlow, J.

Appellee, Frank K. Duzenberg, as administrator of the estate of Roy V. Duzenberg, deceased, in the circuit court of Iroquois county, recovered a judgment of \$2500, against appellant, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, on account of the death of appellee's intestate as the result of a collision between an automobile in which the deceased was riding and a passenger train of appellant, and appellant has prosecuted an appeal to this court.

The declaration consisted of two counts. The first count charged general negligence, and the second count charged the failure to ring a bell or blow a whistle. The principal grounds of reversal urged are that the evidence does not sustain the charge of negligence, but does show that deceased was not in the exercise of due care. On a clear, bright morning, August 31, 1920, about 9:30 o'clock, Roy V. Duzenberg, a single man, nineteen years old, was driving a Dort touring car with the top down, west on a gravel road about two miles south of the village of Iroquois. This road intersects a single track railroad of appellant almost at right angles, the railroad track, however, extending a little to the northwest and southeast. About one rod west of this intersection the gravel road turned at right angles to the north for about ten rods, then turned west eighty rods where it intersected a north and south road leading into the village of Iroquois. At the intersection of the gravel road and the railroad track, the latter was about four feet above the level of the wagon road and there was a grade up to the railroad tracks from the wagon road. On the south side of the wagon road, and on the east side of

Frank K. Dusenberry, Admin. of the
Estate of Roy V. Dusenberry, deceased,

Appellee,

Appeal from the Circuit Court

of Iroquois County.

vs.

The Cleveland, Cincinnati, Chicago &
St. Louis Railway Company,

Appellant.

238 I.A. 641

Follow, 1.

Appellee, Frank K. Dusenberry, as administrator of the estate of

Roy V. Dusenberry, deceased, in the circuit court of Iroquois county,

recovered a judgment of \$2500, against appellant, Cleveland, Cin-

incinnati, Chicago & St. Louis Railway Company, on account of the death

of appellee's intestate as the result of a collision between an auto-

mobile in which the deceased was riding and a passenger train of appel-

lant, and appellant has presented an appeal to this court.

The declaration consisted of two counts. The first count charged

gross negligence, and the second count charged the failure to ring

bell or blow a whistle. The principal grounds of reversal urged

are that the evidence does not sustain the charge of negligence, but

does show that deceased was not in the exercise of due care. On a

clear, bright morning, August 31, 1920, about 9:30 o'clock, Roy V.

Dusenberry, a single man, nineteen years old, was driving a Ford

touring car with the top down, west on a gravel road about two miles

south of the village of Iroquois. This road intersects a single track

railroad of appellant almost at right angles, the railroad track,

however, extending a little to the northwest and southeast. About

one rod west of this intersection the gravel road turned at right

angles to the north for about ten rods, then turned west slightly and

there it intersected a north and south road leading into the village

of Iroquois. At the intersection of the gravel road and the railroad

track, the latter was about four feet above the level of the gravel

road and there was a grade up to the railroad track from the gravel

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the railroad right of way, there were wire fences. On the south side of the wagon road there was an oats stubble field about 875 feet wide north and south, which extended east from the railroad right of way. South of the stubble field and joining the railroad right of way on the east was an orchard about 700 feet square. It was enclosed by a fence, and on the north side along the fence was a row of large willow and maple trees, eight or ten feet apart. On the west side of the orchard was a hedge fence thirty or thirty five feet high. Just east of the orchard were the house, barn and out-buildings on the Dayton farm. The surrounding country was level, and the railroad tracks just west of the orchard and from there north to the crossing were about four feet above the level of the surrounding land. On the east side of the railroad right of way were telegraph posts about one hundred feet apart. The distance from the northwest corner of the orchard to the crossing in question was 875 feet with practically no obstructions except the telegraph poles, fences and some little vegetation. There were three farm houses near the crossing, the Dayton place south of the highway and east of the railroad about seventy rods; the Hiller place north of the highway and east of the railroad about sixty five rods, and the Karr place south of the highway and west of the railroad. The highway in question, from the point where it intersected the tracks of appellant, ran straight east for about seventy rods to the Hiller corner and then turned south and passed the Dayton farm east of the house.

On the morning in question, deceased, traveled north in his automobile on the north and south road past the Dayton house until he came to the Hiller corner, where he turned west on the road in question which intersects the railroad tracks. The evidence shows that as he passed the Hiller place, he was going twenty five or thirty miles per hour until he reached a point about three hundred feet east of the railroad crossing when he slowed down to eight or ten miles per hour. One witness testified that, when he was fifty feet east of the tracks he was going five miles per hour and apparently shifted his gears to go up the little incline on to the tracks. The passenger train of

On the north side of the railroad right of way, there were wire fences. On the south side of the railroad right of way, there was an extra stubble field about 875 feet wide with and south, which extended east from the railroad right of way. South of the stubble field and joining the railroad right of way on the east was an orchard about 700 feet square. It was enclosed by a fence, and on the south side along the fence was a row of large willow and maple trees, eight or ten feet apart. On the west side of the orchard was a hedge fence thirty or thirty five feet high. Just east of the orchard were the house, barn and out-buildings on the Dayton farm. The surrounding country was level, and the railroad tracks ran just west of the orchard and from there north to the crossing were about four feet above the level of the surrounding land. On the east side of the railroad right of way were telegraph posts about one hundred feet apart. The distance from the northwest corner of the crossing to the crossing in question was 875 feet with practically no change in elevation except the telegraph poles, fences and some little vegetation. There were three farm houses near the crossing, the Dayton house south of the highway and east of the railroad about seventy feet west of the Miller place north of the highway and east of the railroad about sixty five rods, and the Kerr place south of the highway and east of the railroad. The highway in question, from the point where it intersected the tracks of appellant, ran straight east for about twenty rods to the Miller corner and then turned south and passed the Dayton farm east of the house. On the morning in question, appellant, traveling north in his motor vehicle on the north and south road past the Dayton house until he came to the Miller corner, where he turned west on the road in question and intersected the railroad tracks. The witness stated that on his arrival at the Miller place, he was going twenty five or thirty miles per hour. He reached a point about three hundred feet east of the railroad crossing when he slowed down to eight or ten miles per hour. The witness testified that when he was fifty feet east of the tracks he stopped the motor car and apparently shifted his gears to

appellant traveling about sixty miles per hour, was going north approaching the crossing, and at the crossing it struck the automobile and carried it about ninety rods down the track on the pilot and the deceased was killed. The evidence shows that he was a perfectly healthy young man, with eye sight and hearing in perfect condition. He was familiar with the crossing and had passed over it on many occasions. The suit was commenced on October 30, 1920, but not tried until November, 1924.

As to the alleged negligence of appellant, the evidence shows, that on the day in question a gang of eight or ten section men were working on the track south of the crossing. It is conceded that they were south of the orchard at least 1575 feet south of the crossing. There is a conflict in the evidence as to the exact distance they were south of the orchard, the evidence ranging from 300 to 1000 feet, making the total distance south of the crossing of from 1875 to 2575 feet, and it is also probable that they were not all in one place. The engineer and fireman of the passenger train testified that south of the point where the men were working, the whistle was sounded one or more times as a warning to the men to get off the track; that the crossing whistle was sounded at the whistling post eighty rods south of the crossing, and that the whistle was again sounded between the whistling post and the crossing just before the collision. They also testified that the bell was operated by air and was started ringing when the train left Lafayette, Indiana, and it continued to ring until after the collision when it was turned off. We think the evidence clearly and conclusively shows that the whistle was sounded south of the point where the men were working, and that it was also sounded between the whistling post and the crossing just before the collision. We are also inclined to the belief that the preponderance of the evidence shows that the whistle was also sounded at the whistling post, although there is a conflict in the evidence in this respect. Witnesses on the Dayton, Hiller and Karr farms heard the whistle at some of these points, and the attention of all of them was attracted by the whistle to the approach of the train. Various men who were

On the night of May 1934, there were three trains
appellant traveling about sixty miles per hour, was going north
toward the crossing, and at the crossing it struck the auto-
mobile and carried it about ninety rods down the track on the right and
the evidence shows that he was a perfectly
healthy young man, with eye sight and hearing in perfect condition.
The suit was commenced on October 30, 1930, but not tried
until November, 1934.
As to the alleged negligence of appellant, the evidence shows
that on the day in question a gang of eight or ten section men were
working on the track south of the crossing. It is conceded that they
were south of the crossing at least 1575 feet south of the crossing.
There is a conflict in the evidence as to the exact distance they
were south of the crossing, the evidence ranging from 300 to 1000 feet.
The total distance south of the crossing of from 1875 to 2275
feet, and it is also probable that they were not all in one place.
An engineer and fireman of the passenger train testified that south
of the crossing the men were working, the whistle was sounded one
time as a warning to the men to get off the track; that the
whistle was sounded at the whistling post eighty rods north
of the crossing, and that the whistle was again sounded between the
whistling post and the crossing just before the collision. They also
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Miller and Karr terms heard the whistle at

working on the section, and some people who were on the train, testified relative to the ringing of the bell or the blowing of the whistle. The deceased was as near to the train as were the witnesses on the adjoining farms and he was in as good a position to hear the whistle as were these witnesses, unless the noise of the automobile drowned the noise of the whistle. As to the ringing of the bell, the engineer and fireman are corroborated by some of the section men and by other witnesses who were on the train. It is true that several witnesses testified that no bell was rung, and that no whistle was sounded at the whistling post. If the whole negligence depended upon the charge in the second count of the declaration, we would be inclined to hold that such alleged negligence was a question of fact for the jury. Under the first count charging general negligence, the only evidence ^{that} to support it was the speed of the train which was about sixty miles per hour, and was not in violation of law; together with ~~the~~ further claim that the engineer was guilty of negligence in managing his train after he saw deceased. The engineer had a right to suppose that deceased would stop before he reached the crossing. When he saw deceased was not going to stop, he blew the whistle, applied the sand and emergency brake, and tried to stop the train. We do not know of anything more he could have done to have avoided the collision.

Even if it ~~be~~ conceded that the question of negligence was for the jury to determine, the serious question is whether the deceased was in the exercise of due care. The undisputed evidence is that there was a space of 875 feet from the northwest corner of the orchard to the crossing with practically nothing to obstruct the view. The day was clear and bright and the top of the automobile was down. Several of the witnesses testified that the automobile was making considerable noise like its cut-out was open. One witness testified there was no cut-out on the car but we think it clearly appears that the automobile was making considerable noise whether it had a cut-out or not. Four photographs were offered in evidence. One of them was taken from the road on which deceased was traveling, four hundred feet east of the crossing. It shows a practically unobstructed view

[illegible]

of the track for at least 875 feet south of the crossing. Another was taken from the road one hundred feet east of the crossing and shows the same practically unobstructed view even further down the track. The third was taken from the road thirty four feet east of the crossing and from this point there was a clear view down the track for half a mile or more. George Hiller, who lived on the north side of the highway at least fifty rods east of the crossing, testified that he was in his barn yard and saw deceased pass his house going west twenty five or thirty miles per hour, and he continued at that rate as far as the witness could see. The automobile was making ~~such~~ a noise. At that time the train was about twenty rods south of the orchard, which would make it about 1800 feet south of the crossing. The witness saw the train, heard it whistle at this point and again before the crossing was reached. He testified that when he heard the train whistle and saw the automobile going west, he thought something was going to happen and he started on a run for the crossing. It is apparent from this evidence that the deceased had an equal opportunity with Hiller to have seen the train if he had looked. Charles Dayton and his son were in his yard north of the house. They saw deceased go north on the road east of their house and saw him turn west on the highway in question, going twenty or twenty five miles per hour, which rate he kept up to within 200 or 300 feet of the crossing, when he slowed down to about eight miles per hour, and at the time of the collision, he was going five or six miles per hour. They saw the train south of the orchard and heard it whistle for the crossing, four blasts, about a half mile from the crossing. It whistled again just at the crossing. Like Hiller they thought something was going to happen and they got on the running board of an automobile sitting in the yard north of the house so they could better see what took place at the crossing. They testified that the cut-out ^{on} deceased's car was open and it was making a lot of noise. Alva Priest was approaching the crossing from the west. He testified that the deceased was traveling about five miles per hour as he came up to the tracks; that at a point fifty feet east of the track, the deceased turned his head

the track for at least 875 feet south of the crossing. Another was
from the road one hundred feet east of the crossing and shows
a same practically unobstructed view even further down the track.
The third was taken from the road thirty four feet east of the cross-
ing and from this point there was a clear view down the track for
at least a mile or more. George Miller, who lived on the north side of
the highway at least fifty rods east of the crossing, testified that
he was in his barn yard and saw deceased pass his house going west
twenty five or thirty miles per hour, and he continued at that rate
as far as the witness could see. The automobile was making west
noise. At that time the train was about twenty rods south of the
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The witness saw the train, heard it whistle at this point and again
before the crossing was reached. He testified that when he heard the
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was going to happen and he started on a run for the crossing. It is
apparent from this evidence that the deceased had an equal opportunity
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was he kept up to within 200 or 300 feet of the crossing, when he
started down to about half mile per hour, and at the time of the
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train south of the orchard and heard it whistle for the crossing, four
times, about a half mile from the crossing. It whistled again just
before the crossing. Like Miller they thought something was going to
happen and they got on the running board of an automobile sitting in
the yard north of the house so they could better see what took place
at the crossing. They testified that the out-going deceased's car
was open and it was making a lot of noise. Alvin Priest was approach-
ing the crossing from the west. He testified that the deceased was

and looked to the south; that afterwards he stooped over and was doing something with his car, that he thought he was probably changing the gear so as to go up the grade on to the tracks.

From all this evidence, it is apparent that from the time the deceased turned west on this highway, at least sixty five rods east of the crossing, he could see the train at various openings south of the orchard, and there was nothing to prevent him from hearing the whistle, which undoubtedly was sounded a half mile south of the crossing and probably at the whistling post eighty rods south of the crossing, unless it was the noise of his automobile. When he was opposite or just north of the orchard, there was an unobstructed view for over 875 feet south of the crossing. Under this condition of the evidence we do not understand how it can be claimed that the ~~deceased~~ deceased was in the exercise of due care and caution for his own safety. It would serve no good purpose to cite cases in which under facts similar to these it has been held that the deceased was not in the exercise of due care and caution. We are of the opinion that under the evidence presented the finding of the jury that the deceased was in the exercise of due care and caution is contrary to the weight of the evidence.

With the evidence in this condition it was of the utmost importance that the jury should be properly instructed. The first instruction given on behalf of the appellee was with relation to the interest which the witnesses might have in the event of the suit and told the jury that they had the right to take into consideration such interest growing out of the relationship to either of the parties, as employees, or otherwise. This instruction has been condemned in *Bennett v. Chicago City Ry. Co.*, 243 Ill. 420; *Roberts vs. Chicago City Railway Co.*, 262 Ill. 228; *Carlin vs. Chicago City Railway Co.*, 205 Ill. App. 303.

The second instruction told the jury that in assessing the damages they were not confined to the pecuniary value of the services of the deceased to his next of kin until he would have arrived at the age of twenty one years, but they might consider the pecuniary benefit which the next of kin might have derived from said deceased had he not been killed. Section 2, Chapter 70, provides that the damages shall be

was looking to the south; that afterwards he stooped over and was
confronted with his car, that he thought he was probably chang-
ing the seat so as to go up the grade on to the tracks.
From all this evidence, it is apparent that from the time the
deceased entered the car, he was in the car, at least sixty feet south
of the crossing, he could see the train of cars approaching and at
the crossing, and there was nothing to prevent him from leaving the
tracks, which undoubtedly was rounded a half mile south of the cross-
ing and probably at the whistling post eighty rods south of the cross-
ing, unless it was the noise of his automobile. When he was opposite
the north of the crossing, there was an unobstructed view for over
the south of the crossing. Under this condition of the evidence
it is not understood how it can be claimed that the deceased was
in the exercise of due care and caution for his own safety. It would
be no good purpose to cite cases in which under facts similar to
these it has been held that the deceased was not in the exercise of
due care and caution. We are of the opinion that under the evidence
presented the finding of the jury that the deceased was in the exer-
cise of due care and caution is contrary to the weight of the evi-
dence. In the evidence in this condition it was of the utmost importance
that the jury should be properly instructed. The first instruction
given on behalf of the appellee was with relation to the interest
of the witnesses might have in the event of the suit and told the
jury that they had the right to take into consideration such interest
in coming out of the relationship to either of the parties, as employees
or otherwise. This instruction has been sustained in *Smith v. Chicago
City Ry. Co.*, 243 Ill. 427; *Roberts v. Chicago City Railway Co.*,
243 Ill. 427; *Carlin v. Chicago City Railway Co.*, 205 Ill. App. 305.
The second instruction told the jury that in assessing the damages
they were not confined to the pecuniary value of the services of the
deceased to the extent of the until he would have arrived at the age of
twenty-one years, but they might consider the pecuniary benefit which
a part of his estate had derived from said deceased had he not been

the pecuniary injuries sustained by the next of kin. It has been held in a long line of cases that this is the measure of damages. Illinois Central Railroad Co. vs. Johnson, 221 Ill. 42; Rhoades vs. Chicago & Alton Railway Co., 227 Ill. 328; Fowler vs. Chicago & Eastern Illinois R. R. Co., 234 Ill. 619. The instruction as given was erroneous.

The seventh instruction told the jury that a person confronted with sudden danger was not required, while in the presence of such danger, to act with the same deliberation and foresight that would be required of him under ordinary circumstances. There was no evidence upon which to base this instruction.

The eleventh instruction told the jury that, if they found from the evidence that plaintiff had made out his case by a preponderance of the evidence as laid in the declaration then the jury must find for the plaintiff. There was no instruction defining the allegations of the declaration, and it has been held in a long line of cases that such an instruction should not be given. Kreiger vs. The Aurora, Elgin & Chicago R. R. Co., 242 Ill. 544; Bale vs. Chicago Junction Ry. Co. 259 Ill. 476; Laughlin vs. Hopkinson, 292 Ill. 80; Lerette vs. Director General of Railroads, 306 Ill. 344.

After the verdict the court permitted the appellee to amend his declaration by changing the date of the accident from July 31, 1920, to August 31, 1920, and error is assigned upon this ruling. We think the court properly permitted the amendment.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

the personal injuries sustained by the next of kin. It has been
held in a long line of cases that this is the measure of damages.
Illinois Central Railroad Co. vs. Johnson, 241 Ill. 421; Illinois vs.
Chicago & Alton Railway Co., 227 Ill. 325; Foster vs. Chicago &
Northern Indiana R. R. Co., 224 Ill. 515. The instruction as given
was erroneous.
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the under danger was not required, while in the presence of such
danger, to act with the same deliberation and foresight that would
be required of him under ordinary circumstances. There was no evi-
dence upon which to base this instruction.
The eighth instruction told the jury that, if they found from
the evidence that plaintiff had made out his case by a preponderance
of the evidence as laid in the declaration then the jury must find
in the plaintiff. There was no instruction defining the obligation
of the declaration, and it has been held in a long line of cases that
such an instruction should not be given. Kreiger vs. The Arrow,
211 Ill. 475; Chicago R. R. Co. vs. Hale vs. Chicago Transfer Co.,
212 Ill. 475; Laughlin vs. Laughlin, 202 Ill. 50; Foster vs.
Chicago & Alton Railway Co., 227 Ill. 324.
After the verdict the court permitted the appellee to amend his
declaration by changing the date of the accident from July 27, 1920,
to August 27, 1920, and error is assigned upon this ruling. We think
the court properly permitted the amendment.
For the errors indicated the judgment will be reversed and the

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of
Aug. in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

August 1, 1900. The first of the year.
and the first of the year.

and the first of the year.

and the first of the year.

Abstract only

7491.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

46 3 La
ordered reported
in full 5-1-26
by court Vol. 460
238 I.A. 642¹

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 11 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

Rehearing Denied Sept 26, 1925

The Hon. NORMAN L. ...

Hon. AUGUSTUS A. ...

Hon. THOMAS M. ...

MEMBERED, ...

...

...

David R. Kershaw,

appellee,

vs.

Appeal from the Circuit Court
of Peoria County.

Illinois Power and Light
Corporation,

appellant,

238 I.A. 642

Partlow, J.

Appellee, David R. Kershaw, began an action on the case in the circuit court of Peoria county against Illinois Power and Light Corporation, Louis Mabee and Zella M. Mabee, his wife, to recover for personal injuries. There was a trial by jury, a verdict finding Louis Mabee and Zella M. Mabee not guilty, finding the Illinois Power and Light Corporation guilty and assessing appellee's damages at \$7000.00. Judgment was rendered upon the verdict, and appellant, Illinois Power and Light Corporation, has prosecuted this appeal.

Knoxville avenue is one of the main thoroughfares of the city of Peoria and extends north and south. It intersects Armstrong avenue at right angles. Both of the streets are paved and the intersection is a closely built up business part of the city. Knoxville avenue from Armstrong avenue south, descends at quite a grade and is known as Knoxville Hill. Pennsylvania avenue intersects Knoxville avenue one square north of Armstrong avenue. Appellant maintains a double track street car line in Knoxville avenue and the distance between the west rail of the track and the west curb of Knoxville avenue is about fourteen feet. At the southwest intersection of Armstrong avenue and Knoxville avenue is a gasoline filling station, and just east of the filling station at the west curb of Knoxville avenue and between thirty and thirty five feet south of the south curb of Armstrong avenue, there is an air filling station. On August 19, 1923, at noon, appellee

David R. Kershaw,

appellee,

vs.

Illinois Power and Light

Corporation,

appellant.

Verdict, 3.

238 I.A. 642

Appellee, David R. Kershaw, began an action on the case in

the circuit court of Peoria county against Illinois Power and Light Corporation, Louis Mabee and Nellie M. Mabee, his wife, to

recover for personal injuries. There was a trial by jury, a

verdict finding Louis Mabee and Nellie M. Mabee not guilty, find-

ing the Illinois Power and Light Corporation guilty and assessing

appellee's damages at \$7000.00. Judgment was rendered upon the

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presented this appeal.

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southwest intersection of Armstrong avenue and Knoxville avenue

is a gasoline filling station, and just east of the filling station

at the west curb of Knoxville avenue and between thirty and thirty

five feet south of the north curb of Armstrong avenue, there is

drove his automobile south on Knoxville avenue and stopped in front of this air filling station with his right wheels about five inches east of the west curb of Knoxville avenue. He got out of his car, took the hose, went around to the east side of the car, stooped down opposite the rear left wheel, facing west, and proceeded to fill his tire. While in this position a street car of appellant came south on the west track. Mrs. Mabee was driving her husband's automobile south, and just before the street car and automobile reached the point where appellee was stooping down, there was a collision between the street car and the automobile of Mrs. Mabee, her automobile struck appellee and so severely injured him that he will be a cripple for life.

The declaration consisted of two counts. The first count, after setting out the facts, alleged that appellant so carelessly, negligently and recklessly drove, managed and operated its street car, and the Mabees so carelessly, negligently and recklessly drove and managed their automobile that by and through the carelessness, negligence and mismanagement of all of the defendants then concurring in that behalf, the street car and the Mabee automobile came in collision, and thereby the Mabee automobile struck appellee and injured him.

The second count, in the main, was the same as the first, but it alleged that on the day in question there was in force in the city of Peoria, an ordinance to regulate traffic on the streets; that Section 2 of the ordinance required every corporation operating a street railway, to stop its cars so that the front end should stand at the near crossing, where the street over which such car was being operated was paved, whenever any passengers desired to get on or off of the car; that at the intersection in question the ordinance required that such corporation should cause its cars to come to a full stop so that the front end should stand at the near crossing, whether passengers desired to get on or off such cars at such crossing, or not; that appellant disregarded its duty in that behalf, negligently, carelessly, unlawfully, and in violation of the ordinance, failed to

...his automobile south on Knoxville avenue and stopped in front
of this air filling station with his right wheels about five inches
of the west curb of Knoxville avenue. He got out of his car,
took the hose, went around to the east side of the car, stooped down
opposite the rear left wheel, facing west, and proceeded to fill his
tire. While in this position a street car of appellant came south
on the west track. Mrs. Mabae was driving her husband's automobile
north, and just before the street car and automobile reached the point
where appellee was stooping down, there was a collision between the
street car and the automobile of Mrs. Mabae, her automobile struck
appellee and he severely injured him that he will be a cripple for
life. ...
The declaration consisted of two counts. The first count, after
setting out the facts, alleged that appellee so carelessly, negli-
gently and recklessly drove, managed and operated his street car,
and the Mabae so carelessly, negligently and recklessly drove and
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gence and mismanagement of all of the defendants then occurring in
act herein, the street car and the Mabae automobile came in colli-
sion, and thereby the Mabae automobile struck appellee and injured
him. ...
The second count, in the same vein, set out the facts, but it
alleged that on the day in question there was a storm in the city
of Knoxville, an ordinance to regulate traffic on the streets, that
section 2 of the ordinance required every corporation operating a
street railway, to stop its cars so that the front and shield stand
on the rear crossing, where the street over which such car was being
crossed was paved, whenever any passengers desired to get on or off
the car, that at the intersection in question the ordinance re-
quired that such corporation should cause its cars to come to a full
stop so that the front and shield stand at the rear crossing, whether
passengers desired to get on or off such cars at such crossing, or

bring its street car to a full stop at the northerly line of Armstrong avenue, but drove the car over and beyond said intersection at a high and dangerous rate of speed, and without giving any proper or sufficient warning of its approach, or of the fact that it had not stopped at said intersection; that the Mabees negligently and carelessly drove their automobile ahead of the street car, and that by reason of the carelessness, negligence, unlawful conduct and mismanagement of all of the defendants of said instrumentalities aforesaid, the street car and the Mabee automobile came into collision and the Mabee automobile struck the appellee and injured him.

It is insisted that these counts charge concurrent negligence against all of the defendants and there cannot be a recovery against one or more without a recovery against all. In other words, that all must be found guilty, or all must be found not guilty; that the first instruction on behalf of appellee announced this rule of law. In support of this contention appellant cites *Cleveland, Cincinnati, Chicago & St. Louis Railway Company vs. Eggmann*, 71 Ill. App. 42, and *St. Louis, Belleville and Suburban Co. vs. Hopkins*, 100 Ill. App. 567.

We are of the opinion that these cases are contrary to the weight of authority; that the rule is that where a suit is brought against two defendants for a tort, and concurrent negligence is charged, that there may be a recovery against one of the defendants, without there being a recovery against both of them, and if the declaration makes a sufficient charge of negligence against the one against whom the verdict is returned that the verdict will be sustained notwithstanding the fact that concurrent negligence was charged. *Davis vs. Taylor*, 41 Ill. 405; *Indianapolis and St. Louis R. R. Co. vs. Hackethal*, 72 Ill. 612; *Illinois Central Railway Co. vs. Foulks*, 191 Ill. 57; *Parmelee Co. vs. Wheelock*, 224 Ill. 194; *Postal Telegraph Cable Co. vs. Likes*, 225 Ill. 249; *Pierson vs. Lyon & Healy*, 243 Ill. 370; *Larquist vs. Hodges*, 248 Ill. 491; *Buck vs. Rosenthal*, 273 Ill. 184; *Matthews vs. Railway Co.* 22 L.R.A. 261; *Cooley on Torts*, 3rd Ed. 227; 14 Am. & Eng. Ann. Cases, 1142. It is insisted by appellant that

these cases do not sustain this rule, but that the negligence in those cases was common negligence and not concurring negligence. It will be found from an examination of these authorities that the rule is laid down as above stated, and in a case of concurrent negligence there may be a recovery against one defendant and it is not necessary that there should be a recovery against all of them.

It is next insisted that a violation of the ordinance, even if proven, was not actionable unless it also was proven that such violation was the proximate cause of the injury complained of; that a right of recovery cannot be based upon a violation of the ordinance unless the ordinance was enacted for the benefit of appellee as distinguished from an ordinance enacted to control some situation other than that in which the parties were placed; that no proper foundation was laid for the introduction of the ordinance because the certificate of the clerk did not show that the ordinance had been published in a newspaper published in the city of Peoria.

The ordinance provides that at the intersection in question appellant shall cause its cars to come to a full stop whether passengers desire to get on or off said cars or not. We do not deem it necessary to consider with any special particularity the purpose for which this ordinance was passed. It is apparent that it was the intent of the ordinance to regulate traffic, and to require cars to stop at this intersection whether passengers desired to get on or off or not. Its purpose may have been to prevent a street car from crossing a paved street which intersected the track at a high rate of speed, or it may have been passed for the purpose of compelling this street car to go down this grade at a reasonable rate of speed. If the latter was the purpose it was material in this case and applicable to the facts here presented. The declaration not only charges that the appellant did not stop its car at this intersection, but it also charges that appellant operated its car at a high and dangerous rate of speed and without sounding any warning. Whether the street car did or did not stop at this crossing, or whether it

These cases do not sustain this rule, but that the negligence in these cases was common negligence and not concurring negligence. It will be found from an examination of these authorities that the rule is laid down as above stated, and in a case of concurrent negligence there may be a recovery against one defendant and it is not necessary that there should be a recovery against all of them.

It is next insisted that a violation of the ordinance, even if it was not actionable unless it also was proven that such violation was the proximate cause of the injury sustained; that a right of recovery cannot be based upon a violation of the ordinance unless the ordinance was enacted for the benefit of appellee as distinguished from an ordinance enacted to control some situation other than that in which the parties were placed; that no proper foundation was laid for the introduction of the ordinance because the certificate of the clerk did not show that the ordinance had been published in a newspaper published in the city of Lewis.

The ordinance provides that at the intersection it is established appellant shall cause its cars to come to a full stop whether passengers desire to get on or off said cars or not. We do not deem it necessary to consider with any special particularity the purpose for which this ordinance was passed. It is apparent that it was the intent of the ordinance to regulate traffic, and to regulate same to stop at this intersection whether passengers desired to get on or off or not. Its purpose may have been to prevent a driver from turning a paved street which intersected the track at a right angle, or it may have been passed for the purpose of controlling the street car to go down this grade at a reasonable rate of speed.

The latter was the purpose it was material in this case and applicable to the facts here presented. The decision was only in favor of the appellant and not the car at this intersection. It is also stated that appellant operated its car at a high rate of speed and without sounding any warning. Whether

was operated at a high and dangerous rate of speed without warning and thus caused the injury, were questions of fact for the jury.

We do not think there was any error in admitting the ordinance because the certificate accompanying it was not sufficient. Under Section 65 of the City and Village Act, the ordinance and the date of its publication could be proven by the certificate of the clerk under the seal of the corporation. It has been held that an ordinance so certified should be prima facie evidence of its passage and that it had gone into effect in one of the modes prescribed by statute. *Village of Attwood vs. Otter*, 296 Ill. 70. This ordinance as it appears in the abstract provides no penalty, and in *DeScheppers vs. Chicago, Rock Island & Pacific Railway Co.*, 179 Ill. App. 298, this court held that where an ordinance does not provide a penalty it does not have to be published. There was no error in admitting the ordinance.

It is insisted that the evidence does not show that appellee was in the exercise of due care and caution for his own safety. The mere fact that he was filling a tire in the street did not constitute negligence as a matter of law. *Marks vs. Chicago Railway Co.* 202 Ill. App. 220. Appellee testified that before he stooped down he looked north and did not see either the street car or the automobile. He did not ~~and~~ notice the street car or automobile until he heard the crash, and almost immediately he was struck. Under these circumstances it was a question for the jury to say whether he was in the exercise of due care and caution for his own safety. The jury was justified in finding he was in the exercise of due care.

The next contention is that the evidence does not sustain the charge of negligence against appellant. As is frequently the case the evidence is in considerable conflict. Mrs. Mabee testified she was driving south on Knoxville avenue. When she approached Pennsylvania avenue she saw the street car turn into Knoxville avenue from Pennsylvania avenue; that she proceeded down Knoxville avenue ahead of the street car and was going about eighteen to twenty miles per hour; that when she reached Armstrong avenue she slowed down to ten

and operated at a high and dangerous rate of speed without warning
and caused the injury, were questions of fact for the jury.
We do not think there was any error in admitting the evidence
that the certificate accompanying it was not sufficient. Under
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the ordinance. Village of Attwood vs. Otter, 206 Ill. 70.
It is insisted that the evidence does not show that appellee was
in the exercise of due care and caution for his own safety. The mere
fact that he was walking in the street did not constitute
negligence as a matter of law. Marks vs. Chicago Railway Co., 202 Ill.
App. 298. Appellee testified that before he stooped down he looked
forth and did not see either the street car or the automobile. He did
not notice the street car or automobile until he heard the crash, and
immediately he was struck. Under these circumstances it was
question for the jury to say whether he was in the exercise of due
care and caution for his own safety. The jury was justified in find-
ing that he was in the exercise of due care.
The next contention is that the evidence does not sustain the
charge of negligence against appellee. As is frequently the case
in cases of this kind, the evidence is conflicting. The facts testified
to by the appellee are that he was walking in the street and
was proceeding down Knoxville Avenue when
the street car and the automobile came upon him from behind and
struck him. That the automobile was proceeding down Knoxville Avenue ahead
of the street car and was going about eighteen to twenty miles per

or twelve miles per hour; that she was travelling with her left wheels in the street car track; that when she saw appellee stooping down she suddenly turned to the left, killed her engine, and before she could start it the street car struck her automobile and knocked it against appellee.

Edward Weidneicht testified that he was in a drug store almost opposite the scene of the accident; that whe he first saw the automobile it was in front and about four feet ahead of the street car; that he saw the automobile fully in front of the street car, and that it was in front of the street car immediately preceding the collision.

Roy M. Meisenger was driving an automobile north on Knoxville avenue almost a ^{square} ~~block~~ south of the point of the collision. He saw the street car coming south down the hill from Armstrong avenue and the Mabee automobile was alongside of the street car. He saw the automobile cut diagonally to the left in front of the street car when the street car was close to the automobile. The automobile tried to squeeze in ahead of the street car. He did not actually see them come together because he was down the street.

Robert M. Wrigley was driving south on Knoxville avenue about half a block north of Armstrong avenue. The street car stopped at the north side of Armstrong avenue and the automobile came to a stop in the rear of the street car. When the street car started, the automobile also started, and went across Armstrong avenue alongside the street car, and was travelling faster than the street car. When the front end of the street car reached a point a little south of Armstrong avenue, the automobile had partly passed the street car, and then the automobile suddenly turned to the left and went diagonally in front of the street car when the street car was only a distance of three or four feet away from the automobile. The right front corner of the street car struck the left side of the automobile just back of the front fender and pushed the rear end of the automobile around fifteen or eighteen feet. Immediately preceding the

Exhibited at a trial and testimony taken

of twelve miles per hour; that she was travelling with her left wheel in the street car track; that when she saw appellee stooping down she suddenly turned to the left, killed her engine, and before she could start it the street car struck her automobile and knocked it against appellee.

Edward Weidensel testified that he was in a drug store almost opposite the scene of the accident; that when he first saw the automobile it was in front and about four feet ahead of the street car; that he saw the automobile fully in front of the street car, and that it was in front of the street car immediately preceding the collision.

John M. Meisenger was driving an automobile north on Knoxville avenue almost ~~at~~^{about} south of the point of the collision. He saw the street car coming south down the hill from Armstrong avenue and the street car was alongside of the street car. He saw the automobile out diagonally to the left in front of the street car when the street car was close to the automobile. The automobile tried to pass in front of the street car. He did not actually see the collision. Some time before he was down the street.

Robert W. Wright was driving south on Knoxville avenue about a block north of Armstrong avenue. The street car stopped at the north side of Armstrong avenue and the automobile came to a stop in the rear of the street car. When the street car started, the automobile also started, and went across Armstrong avenue alongside the street car, and was travelling faster than the street car. When the front end of the street car reached a point a little south of Armstrong avenue, the automobile had partly passed the street car, and then the automobile suddenly turned to the left and went diagonally in front of the street car when the street car was only a distance of three or four feet away from the automobile. The right front corner of the street car struck the left side of the automobile.

accident the street car was going possibly twelve to fifteen miles an hour, and the automobile was going at the same rate of speed. The witness was directly behind both cars and was only in a position to see that either the driver had misjudged the distance or else had slackened her speed.

Charles J. West was a passenger on the street car, sitting on the west side about the middle, looking out of the west window. He testified that as the street car crossed Armstrong avenue he saw an automobile alongside and saw it make a short turn to the left bringing the automobile in front of the street car. The left front wheel of the automobile was inside of the west rail of the car track and the left rear wheel was outside the rail. The automobile was struck further forward than the center. He was asked where the front end of the automobile was at the time when he first saw it with reference to the front end of the street car and in reply stated, "Well, they were running pretty close together - I couldn't see - not being up in front, but it could have been a little ahead, that is, the automobile could have been ahead of the street car."

Wilmer A. McNamara was also a passenger on the street car and testified that while the street car was stopped at Armstrong avenue he turned around and saw the automobile stopped at the rear of the street car. After the street car started, the automobile ran alongside crossing Armstrong avenue and it was running faster than the street car. Just a little south of Armstrong avenue the automobile turned to the left when the street car was close to it, and that it looked as though the street car and the automobile and appellee's automobile all came together at once.

Mike Doran, the motorman on the street car, testified that the car stopped at the north side of Armstrong avenue. The first he saw of the automobile was when it came up to the front end of the street car and cut in ahead when the street car was two or three feet away from the automobile. As soon as he saw the automobile start to come in ahead he reversed the power. The right front bumper of

...the street car was going possibly twelve to fifteen miles
...and the automobile was going at the same rate of speed.
...the witness was directly behind both cars and was only in a position
...to see that either the driver had misjudged the distance or else
...had miscalculated her speed.

...West was a passenger on the street car, sitting on
...the west side about the middle, looking out of the west window. He
...testified that as the street car crossed Armstrong Avenue he saw
...an automobile alongside and saw it make a short turn to the left
...placing the automobile in front of the street car. The left front
...wheel of the automobile was inside of the west rail of the car track

...and the left rear wheel was outside the rail. The automobile was
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...end of the automobile was at the time when he first saw it with
...reference to the front end of the street car and in reply stated,
..."Well, they were running pretty close together - I couldn't see
...it being up in front, but it could have been a little ahead, that
...is, the automobile could have been ahead of the street car."

...Miss A. McNamee was also a passenger on the street car and
...testified that while the street car was stopped at Armstrong Avenue
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...street car. After the street car started, the automobile ran along
...the crossing Armstrong Avenue and it was running faster than the
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...turned to the left when the street car was close to it, and that it
...looked as though the street car and the automobile and appellee's
...automobile all came together at once.

...Miss Moran, the motorman on the street car, testified that the
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...from the automobile. As soon as he saw the automobile start to

the street car struck the automobile on the left side at about the front seat; that the street car weighed about twenty tons. He was going down an incline and had more momentum as he went down the hill; that he was forty feet away from appellee when he first saw him; that he knew the space was narrow between the street car and the curbing, just about room for a couple of cars to pass. He did not slacken speed or attempt to do anything when he saw appellee until he saw the automobile actually in front of him.

In Sullivan vs. Ohlhaber, 214 Ill. App. 672, a suit was brought by the plaintiff to recover for personal injuries in a collision between a truck of the plaintiff in error and an automobile of one James Feece, another defendant. The plaintiff parked his automobile next to the curb, and the Feece automobile stood next to the curb about five feet to the rear of plaintiff's car facing in the same direction. Plaintiff was standing in the rear of his automobile lighting his tail light. The Feece automobile suddenly turned out into the street as the truck of the plaintiff in error came along, and violently collided with the Feece automobile and knocked it against the plaintiff and injured him. The declaration alleged that the negligence of the defendants concurred to bring about the injury. A separate trial was granted to the defendant Feece, and a verdict was rendered against the plaintiff in error for \$8000.00, which was affirmed by this court. In deciding the liability of the plaintiff in error this court held that the evidence showed that at the time of the injury the delivery truck of plaintiff in error was running in the business section of the city in violation of the speed laws; that in consequence thereof it collided with the Feece automobile causing the injury; that the injury resulted from the concurrent acts of both parties, and it is reasonable to assume that if the delivery truck had come along the street at the slow rate of speed which plaintiff in error contends for, it would not have reached the Feece automobile at the time it turned into the street; and furthermore, even if it had reached it, it

the street car struck the automobile on the left side at about the front seat; that the street car weighed about twenty tons. He was going down an incline and had more momentum as he went down the hill; that he was forty feet away from appellee when he first saw him; that he knew the place was narrow between the street car and the building, just about room for a couple of cars to pass. He did not attempt speed or attempt to do anything when he saw appellee until he saw the automobile actually in front of him.

In testimony of J. Williams, RIA III. App. 572, a writ was brought by the plaintiff to recover for personal injuries in a collision between a truck of the plaintiff in error and the automobile of one James Teese, another defendant. The plaintiff parked his automobile next to the curb, and the Teese automobile stood next to the curb about five feet to the rear of plaintiff's car facing in the same direction. Plaintiff was standing in the rear of his automobile looking into the street. The Teese automobile suddenly turned out into the street as the trunk of the plaintiff in error came along, and plaintiff collided with the Teese automobile and was injured. The plaintiff and James Teese were both traveling westward along the street at the time of the collision. The plaintiff testified that the negligence of the defendant concerned to bring about the injury. A separate trial was granted to the defendant Teese, and a verdict was rendered against the plaintiff in error for \$5000.00, which was affirmed by this court. In reaching the judgment of the plaintiff in error this court said that the evidence showed that at the time of the injury the delivery truck of plaintiff in error was parked in the business section of the city in violation of the city laws; that in consequence thereof it collided with the Teese automobile causing the injury; that the injury resulted from the concurrent acts of both parties, and it is reasonable to assume that if the delivery truck had come along the street at the same rate of speed which plaintiff in error contends for, it will not have reached the Teese automobile at the time it turned

would not have caused a collision of such violence and force as to have pushed the Feece automobile over against the defendant in error.

The Supreme Court, in affirming the judgment, 291 Ill. 359, on page 361 said:

"It is contended by plaintiff in error that the negligent act of Feece turning into the street without warning constituted a separate, independent and intervening cause of the accident, and that there is no evidence showing the act of the plaintiff in error to be the proximate cause of the injury. The evidence was sufficient to establish the conclusion of the fact that the injury was the result of the combined negligence of plaintiff in error and Feece. There was sufficient evidence for the jury to find that, notwithstanding the negligence of Feece, the accident would not have happened if plaintiff in error had not been running at an unreasonable rate of speed or had not obstructed the view of its driver by the covering on the windshield, so that the driver could not readily see Feece turning into the street.

The mere fact that the injury would not have happened but for the negligence of Feece is not sufficient to exonerate plaintiff in error, for if defendant in error was injured by the combined negligence of both parties he can maintain an action against either.

The driver of the truck was bound to use at least reasonable and ordinary care. (He was bound to anticipate that the cars parked along the curb might turn into the street, and to keep a proper lookout for them and use care to have his truck under such control as to enable him to avoid collisions.) It was for the jury to decide what the rate of speed was, whether it was negligence to drive down La Salle street under the special conditions then existing at the rate of speed shown by the evidence; whether it was negligence to have the windshield partly covered with cloth and whether the truck was otherwise negligently managed and operated."

Armstrong avenue between curbs was about forty feet wide. Appellee was about thirty five feet south of the south curb of Armstrong avenue, consequently, when the street car was at the north side of Armstrong avenue, the motorman was less than one hundred feet from appellee. There is nothing in the evidence to show any obstruction between the motorman and the appellee which would prevent the motorman from seeing appellee unless it was the Mabee automobile. The motorman testified that when he was forty feet away he saw appellee's car and saw appellee stooped down beside it. The distance from the west rail, to the west curb of Knoxville avenue, was fourteen feet. In this space stood appellee's automobile with appellee on the east side of it. This would leave only about seven feet between appellee and the west rail, which would be barely enough room for an automobile to pass between the street car and appellee. The motorman testified he knew

would not have caused a collision of such violence and force as to have caused the Pease automobile over against the defendant in error. The Supreme Court, in affirming the judgment, 291 Ill. 559, on

page 511 said:

"It is contended by plaintiff in error that the negligence of Pease turning into the street without warning constituted a separate, independent and intervening cause of the accident, and that there is no evidence showing the act of the plaintiff in error to be the proximate cause of the injury. The evidence is sufficient to establish the conclusion of the fact that the injury was the result of the combined negligence of plaintiff in error and Pease. There was sufficient evidence for the fact to find that, notwithstanding the negligence of Pease, the accident would not have happened if plaintiff in error had not been turning at an unreasonable rate of speed or had not obstructed the view of the driver by the covering on the windshield, so that the driver could not readily see Pease turning into the street.

The mere fact that the injury would not have happened but for the negligence of Pease is not sufficient to constitute plaintiff in error, for it defendant in error was injured by the combined negligence of both parties he can maintain an action against either.

The driver of the truck was bound to use at least reasonable and ordinary care. (He was bound to anticipate that the cars would be along the curb might turn into the street, and to keep a lookout for them and was care to have his truck under such control as to enable him to avoid collisions.) It was for the jury to decide what the rate of speed was, whether it was negligent to drive down the alley street under the special conditions then existing at the rate of speed shown by the evidence; whether it was negligence to have the windshield partly covered with cloth and whether the truck was otherwise negligently managed and operated."

Armstrong avenue between curbs was about forty feet wide. Appellee was about thirty five feet south of the south curb of Armstrong avenue, consequently, when the street car was at the north side of Armstrong avenue, the motorcar was less than one hundred feet from appellee. There is nothing in the evidence to show any obstruction between the motorcar and the appellee which would prevent the motorcar from seeing appellee unless it was the Pease automobile. The motorcar testified that when he was forty feet away he saw appellee's car and saw appellee stopped down beside it. The distance from the west tail of the west curb of Knoxville avenue, was fourteen feet. In this distance appellee's automobile with appellee on the east side of it. This would leave only about seven feet between appellee and the west tail, which would be barely enough room for an automobile to pass

there was this small space just large enough for a car to pass. The greater number of witnesses testified that the street car stopped at Armstrong avenue. Conceding that the preponderance of the evidence shows that the street car stopped at the north side of Armstrong avenue, when the motorman started his car, it was his duty to do so at such a rate of speed, and in such a manner, as was proper under the facts appearing in evidence. The street car weighed about twenty tons and started down hill and consequently would gain momentum if it was not controlled. The motorman said he was going eight or nine miles an hour at the time of the collision. Other witnesses testified he was going as high as fifteen or twenty miles per hour. It is undisputed, however, that he was travelling at such a rate of speed than when he strock the Mabee automobile he pushed it sidewise from fifteen to eighteen feet. Under the circumstances appearing in evidence it was the duty of the motorman to watch for any automobiles which might come in front of his car. Mrs. Mabee testified that she was travelling in front of the street car all the time. She is corroborated in this respect by Weidneicht, who testified that she was four feet in front of the street car just before the collision. West testified that the automobile could have been ahead of the street car, and Wrigley said the automobile had partly passed the car before the collision. If the automobile was in front of the street car, or had partly passed it, before the collision, it was a question of fact for the jury to say whether or not the motorman should have seen it, and whether he was guilty of negligence in not slackening the speed of his car, or having it under control, or whether he should have sounded a warning, or whether he did sound a warning when he came to the narrow space in which appellee was stooping. If the jury saw fit to believe the witnesses who testified on behalf of appellee they were justified in finding that the motorman was guilty of the negligence charged in the declaration. If he was guilty of the negligence charged then appellant was liable regardless of any negligence of which Mrs. Mabee might have been guilty. We are not authorized to reverse the judgment upon the facts unless we can say that the verdict is clearly

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greater number of witnesses testified that the street car stopped at
Armstrong avenue. Conceding that the preponderance of the evidence
shows that the street car stopped at the north side of Armstrong
avenue, when the motorist started his car, it was his duty to do so
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facts presented in evidence. The witness was not in a position to see
and started down hill and came within a few feet of the street car
and testified. The motorist said he was going eight or nine miles
an hour at the time of the collision. Other witnesses testified he
was going as high as fifteen or twenty miles per hour. It is un-
likely, however, that he was traveling at such a rate of speed than
when he struck the street automobile he pushed it aside from the
road to fifteen feet. Under the circumstances appearing in evidence
it was the duty of the motorist to stop for the street car which
was in front of him. The witness testified that he
traveled in front of the street car all the time. She is correct
and in this respect by Wellmeyer, who testified that she was four
feet in front of the street car just before the collision. West
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car, and Wright said the automobile had partly passed the car before
the collision. If the automobile was in front of the street car, it
had partly passed it, before the collision, it was a question of fact
for the jury to say whether or not the motorist should have
known whether he was guilty of negligence in not stopping the car
of his car, or having it under control, or whether he should have
sounded a warning, or whether he did sound a warning when he came to
the narrow space in which appellee was stopping. If the jury saw fit
to believe the witnesses who testified on behalf of appellee they were
entitled in finding that the motorist was guilty of the negligence
charged in the declaration. If he was guilty of the negligence charged
then appellee was liable regardless of any negligence of which Mrs.
West might have been guilty. We are not authorized to reverse the

and manifestly against the weight of the evidence. We have examined this evidence with considerable care and have reached the conclusion that we would not be justified in reversing the judgment on the ground that it is contrary to the manifest weight of the evidence.

Complaint is made of various instructions given, refused and modified. The fourth instruction told the jury as to the elements to be taken into consideration in determining the preponderance of the evidence. Among other things it stated that the weight of the testimony does not necessarily depend upon the greater number of witnesses, but the jury should consider the number of witnesses, together with all the facts and circumstances in evidence, etc., and if the jury believe from the evidence that the evidence of a smaller number of witnesses on one side is more credible and trustworthy than the evidence of the greater number on the other side, they have a right to consider that the evidence preponderates on the side of the smaller number of witnesses. Cases are cited in which appellant contends that this instruction has been condemned. We have examined all of these cases and find that in each of them the instruction condemned was materially different from the one now before us. In *St. Louis & O'Fallon Ry. Co. vs. Union Trust & Savings Bank*, 209 Ill. 457, an instruction in almost the exact language of the one now before us was approved.

The eighth instruction on behalf of appellee was as to the form of the verdict and told the jury that they could find part of the defendants guilty and the others not guilty. What we have already said with reference to the joint and several liability of tortfeasors is applicable to this instruction and no error was committed in giving it.

The court modified the twenty fifth instruction offered by appellant by inserting the word 'not' in it. It is insisted that this made the instruction confusing and detracted from its force. The instruction as modified announced a correct rule of law and was probably more favorable to appellant than it was as originally drawn. To say the least there was no error in giving it.

Error is assigned upon the refusal of the thirty second and thirty third instructions offered by appellant. These instructions are

...have examined
...weight of the evidence.
...conclusion
...evidence with considerable care and have reached the conclusion
...not be justified in reversing the judgment on the ground
...it is contrary to the weight of the evidence.

...is made of various instructions given, refused and
...the fourth instruction told the jury as to the elements to
...consideration in determining the preponderance of the
...other things it stated that the weight of the testi-
...necessarily depend upon the greater number of witnesses,
...consider the number of witnesses, together with all
...circumstances in evidence, etc., and if the jury believe
...the evidence that the evidence of a smaller number of witnesses
...is more credible and trustworthy than the evidence of the
...on the other side, they have a right to consider that
...evidence preponderates on the side of the smaller number of wit-
...cases are cited in which appellant contends that this in-
...has been condemned. The court stated all of these cases
...in each of them the instruction condemned was materially
...from the one now before us. In St. Louis & O'Fallon Ry.
...Union Trust & Savings Bank, 209 Ill. 457, an instruction in
...the exact language of the one now before us was approved.

...the eighth instruction on behalf of appellee was as to the form of
...verdict and told the jury that they could find part of the defend-
...guilty and the others not guilty. What we have already said with
...to the joint and several liability of tortfeasors is appli-
...to this instruction and no error was committed in giving it.
...the court modified the twenty fifth instruction offered by appel-
...by inserting the word 'not' in it. It is insisted that this made
...instruction confusing and detracted from its force. The instanc-
...announced a correct rule of law and was probably more
...to appellant than it was as originally drawn. To say the
...was no error in giving it.

practically duplicates and their material parts were covered by the twenty third given on behalf of appellant. They told the jury that the motorman was not required to anticipate that Mrs. Mabee would suddenly drive her automobile on the track in front of the street car. Whether the motorman was required to anticipate this act depended entirely upon the facts and circumstances in evidence. It was not the province of the court to tell the jury what facts the motorman was, or was not, required to anticipate. Both instructions were properly refused.

Appellant's thirty fourth refused instruction told the jury that, by reason of appellant's convenience to the public as a common carrier of passengers, and because of the inability of its cars to turn out, the car of appellant had the right of way over other vehicles over that part of the street occupied by the tracks. This instruction announced an abstract proposition of law and might have been very misleading. The jury might have been led to believe that other vehicles on the street car track had no legal right there and were trespassers, which is not the law.

We find no reversible error and the judgment will be affirmed.
 Judgment affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTICE J. JOHNSON Clerk of the Court
of the State of Illinois, and keeper of the Records and see thereof
being is a true copy of the opinion of the said Appellate Court in

Attest, I hereunto set my hand and seal of
Court at Ottawa, this
day of

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. NORMAN L. JONES, Presiding Justice

Hon. AUGUSTUS A. PARTLOW, Justice

Hon. THOMAS M. JETT, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

238 I.A. 642 2

BE IT REMEMBERED, that afterwards, to-wit: On July 14, 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

School Directors of District No. 89,
County of Winnebago and State of Illi-
nois; School Directors of District
No. 95, County of Winnebago and State
of Illinois; ~~School Directors of District~~
~~No. 96, County of Winnebago and State of Illinois;~~
School Directors of District No. 98,
County of Winnebago and State of Illi-
nois; School Directors of District
No. 101, County of Winnebago and State
of Illinois;

Appellants,

vs.

Appeal from Circuit
Court of Winnebago
County.

Trustees of Schools of Township No.
26, North, Range No. 10, East of the
Fourth Principal Meridian; Trustees
of Schools of Township No. 26, North,
Range No. 11, East of the Fourth Prin-
cipal Meridian; Board of Education of
Community Consolidated School District
No. 124, County of Winnebago and State
of Illinois; C. P. Coolidge, President
of the Board of Education of Community
Consolidated School District No. 124,
County of Winnebago and State of Illi-
nois; M. B. Livingston, William Lig-
gett, L. J. Haley, Harry Barrack, Elmer
Mellon and Marion Watson, members of
Board of Education of Community Consol-
idated School District No. 124, County
of Winnebago, and State of Illinois,
Appellees.

Jett, J.

This is a mandamus proceeding instituted by School
Directors of District No. 89, County of Winnebago and State of
Illinois; School Directors of District No. 95, County of
Winnebago and State of Illinois; School Directors of District
No. 98, County of Winnebago and State of Illinois; School
Directors of District No. 101, County of Winnebago and State
of Illinois, appellants, against Trustees of Schools of
Township No. 26, North, Range No. 10, East of the Fourth
Principal Meridian; Trustees of Schools of Township No. 26,
North, Range No. 11, East of the Fourth Principal Meridian;
Board of Education of Community Consolidated School District
No. 124, County of Winnebago and State of Illinois; C. P.
Coolidge, President of the Board of Education of Community

School Directors of District No. 28,
 County of Winnebago and State of Illi-
 nois; School Directors of District
 No. 101, County of Winnebago and State
 of Illinois;
 School Directors of District No. 28,
 County of Winnebago and State of Illi-
 nois; School Directors of District
 No. 101, County of Winnebago and State
 of Illinois;
 Appellants,

Appeal from Circuit
 Court of Winnebago
 County.

vs.

Trustees of Schools of Township No.
 10, Range No. 10, East of the
 Principal Meridian; Trustees
 of Schools of Township No. 28, North,
 Range No. 11, East of the Fourth Prin-
 cipal Meridian; Board of Education of
 Community Consolidated School District
 No. 124, County of Winnebago and State
 of Illinois; C. P. Goetting, President
 of the Board of Education of Community
 Consolidated School District No. 124,
 County of Winnebago and State of Illinois;
 N. B. Livingston, William H.
 J. J. Halsey, Harry Harnack, Elmer
 and Marion Watson, members of
 Board of Education of Community Consoli-
 dated School District No. 124, County
 of Winnebago and State of Illinois;
 Appellees.

This is a mandamus proceeding instituted by School
 Directors of District No. 28, County of Winnebago and State of
 Illinois; School Directors of District No. 28, County of
 Winnebago and State of Illinois; School Directors of District
 No. 28, County of Winnebago and State of Illinois; School
 Directors of District No. 101, County of Winnebago and State
 of Illinois, appellants, against Trustees of Schools of
 Township No. 28, North, Range No. 10, East of the Fourth
 Principal Meridian; Trustees of Schools of Township No. 28,
 North, Range No. 11, East of the Fourth Principal Meridian;
 Board of Education of Community Consolidated School District
 No. 124, County of Winnebago and State of Illinois; C. P.
 Goetting, President of the Board of Education of Community

Consolidated School District No. 124, County of Winnebago and State of Illinois; M. B. Livingston, William Liggett, L. J. Haley, Harry Barrack, Elmer Mellon and Marion Watson, members of Board of Education of Community Consolidated School District No. 124, County of Winnebago, and State of Illinois, Appellees, to compel appellees trustees of schools to set off to their credit certain moneys and real and personal property, claimed to be due to the appellants, on the detachment of their districts from a Community Consolidated school district. It appears that on April 24, 1920, Appellant Districts, together with three other common school-districts, formed Community Consolidated School District Number 124. At the time of the consolidation Appellant District Number 89, had \$747.48; No. 95 had \$1207.51; No. 98 had \$365.53, and No. 101 had \$1082.26, totaling \$3384.78 in money to their credit, and each was possessed of a school building and site, and equipment for the same. On the organization of the new District No. 124, it took possession and control of this real estate and personal property, and had the money placed to its credit on the books of the township treasurer, and proceeded to levy and collect taxes on all of the lands and property in the newly consolidated district.

In conformity with the provisions of the Community Consolidated Act, as amended in 1923, appellants each filed a petition on July 12th, 1923, with the County Superintendent of Schools of Winnebago County, requesting that a vote be taken to detach its territory from the Consolidated School District. Complying with the prayer of the petitions, presented by said appellants, the County Superintendent of Schools of the said County of Winnebago, called an election, which was held on August 4th, 1923, and the proposition to detach, carried by the requisite number of affirmative votes in each district. The four districts were detached and thereafter proceeded to elect directors and organize, under and with the direction and assistance of the County Superintendent of Schools as provided by statute. It appears that

at the time of detachment, the Consolidated School District had accumulated from tax receipts, together with the above initial transfer of funds the following amount of money:-

| | |
|-------------------------------------|-------------|
| In the Educational Fund. | \$22,940.56 |
| In the Building Fund | 22,273.03 |
| In the Distributable Fund | 4,527.32 |
| Total | \$49,740.91 |

and had no bonded indebtedness or contract obligations of any nature, except for small current expenses.

Appellants each filed a written request with appellees, Trustees of School, of the two Townships, in which the said Consolidated District was situated, asking that they meet and distribute the money on hand, so that each of the detached districts would receive its proportionate share, and further asking them to appoint appraisers to value the real and personal property, and to charge or credit the same as the case might be, to each of the districts.

The trustees, refused to meet as requested, and refused to comply with the request of appellants to meet and distribute the money on hand, and to appoint appraisers to value the real and personal property, and to charge or credit as the case might be, to the respective districts, such sum or sums as might be found to be due to them or from them; whereupon the appellants filed their petition for mandamus, alleging the facts as above indicated in detail, and that they had no funds or equipment, or means of obtaining the same, and that their credit was impaired, and that they could not adequately carry on their schools and prayed the court that the writ issue to compel the appellees, trustees to conform to their request.

The Board of Education of the Consolidated District and the president and members thereof, being interested in the subject matter of the litigation, were made parties defendants. The Board of Education of the Consolidated District and the members thereof, filed a general demurrer to the petition, which the trial court sustained, and judgment was entered dismissing the petition and for costs, from which judgment an appeal was perfected to this court.

demurrer and dismissing the petition, is assigned as error. As we view it, ~~the main question raised on~~ ^{there is in this appeal but one question raised and presented, and that is:-} Upon the detachment of the petitioner districts from the Community Consolidated School District, does Sections 64 and 65 of the School Law apply and require the Trustees of Schools to make a distribution of assets? The four appellant school districts, base their claim to the relief prayed for in their petition for mandamus, upon the provisions of Sections 64 and 65 of the School Act of 1909. Sections 64 and 65 are as follows:-

"64. Distribution of Funds. When a new district has been formed by the trustees, or by the county superintendent or county superintendents, from a part of a district or parts of two or more districts, the trustees of the township or townships concerned shall make forthwith a distribution of tax funds, or other funds in the hands of the treasurer, or to which the district may at the time of such division be entitled, so that the old and new districts shall receive parts of such funds in proportion to the amount of taxes collected next preceding such division from the taxable property in the territory composing the several districts. If the new districts be composed of parts of two or more districts, the trustees shall make distribution of such funds between the new district and the old districts respectively, so that the new district shall receive a distribution of the funds of each of the old districts in the proportion which the amount of taxes collected from the property in the territory of the new district bears to the whole taxes collected next before the division in the old district; and the township treasurer shall forthwith place the sum so distributed to the credit of the respective districts, and shall immediately place the proportion of the funds to which the new district may be entitled to its credit on his books; and the funds on hand shall be subject at once to the order of the directors of the new district; and those not on hand, as soon as collected.

1st. Upon the detachment of the petitioners from the Community Consolidated School District, does Sections 64 and 65 of the School Law apply and require the Trustees of Schools to make a distribution of assets? The Trustees of the petitioners' school district, have their claim to the relief prayed for in their petition for mandamus, upon the provisions of Sections 64 and 65 of the School Act of 1900. Sections 64 and 65 are as follows:-

"64. Distribution of Funds. When a new district has been formed by the purchase, or by the county superintendent or county superintendent, from a part of a district or parts of two or more districts, the trustees of the township or townships concerned shall make forthwith a distribution of tax funds, or other funds in the hands of the treasurer, or to which the district may at the time of such division be entitled, so that the old and new districts shall receive parts of such funds in proportion to the amount of taxes collected next preceding such division from the taxable property in the territory composing the several districts. If the new district be composed of parts of two or more districts, the trustees shall make distribution of such funds between the new district and the old districts respectively, so that the new district shall receive a distribution of the funds of each of the old districts in the proportion which the amount of taxes collected from the property in the territory of the new district bears to the whole taxes collected next before the division in the old district; and the township treasurer shall forthwith place the sum so distributed to the credit of the respective districts, and shall immediately place the proportion of the funds to which the new district may be entitled to its credit on his books, and the same on hand shall be subject at once to the order of the trustees of the new district, and those not on hand, as soon

65. Appraisement of school property of new district.

When a new district is created or within thirty days thereafter, the trustees of the township or townships concerned shall appoint three appraisers, who shall not be residents of the township or townships interested. It shall be the duty of such appraisers, within thirty days after their appointment, to appraise the school property, real and personal, of the district or districts interested, at their fair cash value. Within thirty days after such appraisement, the trustees of the township or townships concerned shall charge the property to the district in which it may be found, and credit the other districts interested with its proportion of such valuation: Provided, however, that the bona fide debts of the old district shall first be deducted and the balance charged and credited as aforesaid; and the trustees shall direct the treasurer to place to the credit of the district not retaining such property, its proportion of the value thereof, and of the funds then on hand, or subsequently to accrue, belonging to the district to which such property is charged."

We understand the position of appellants to be, 1st, that the Community Consolidated School Act of 1919, as amended in 1923, creates an entirely new form of school district, not bound by the provisions of the general School Law, except where expressly stated; 2nd, that the terms of the Consolidated School Act, show an intent on the part of the Legislature to take from detached territory, the right to participate in the distributive share of the wealth of the Consolidated District, unless such detachment be a part of a complete dis-continuance of the consolidated district, and the re-organization of the former common school districts, of which it is composed under the provisions of Section 841 of the Act of 1919, as amended in 1923. This last position assumed by appellees, is based entirely upon the act of 1919, as amended in 1923, by which it is provided that in the event of the discontinuance of a community consolidated district, and reorganization of the former school districts of which it is composed, then the former common school districts, will participate in the wealth

... of school property or new district,
... is created or within thirty days thereafter,
the trustees of the township or township concerned shall appoint
three appraisers, who shall not be residents of the township or
townships interested. It shall be the duty of such appraisers,
within thirty days after their appointment, to appraise the
property, and to report the same to the trustees of the township
interested, at their first meeting. Within thirty days after
such appraisal, the trustees of the township or township
concerned shall change the property to the district in which
it may be found, and credit the other districts interested with
its proportion of such valuation. Provided, however, that the
same time date of the old district shall first be deducted and
the balance charged and credited as aforesaid; and the trustees
shall direct the treasurer to place to the credit of the district
not retaining such property, its proportion of the value thereof,
and of the funds then on hand, or subsequently to receive, belong-
ing to the district to which such property is changed."
We understand the position of appellants to be,
first, that the Consolidated School Act of 1919, as
amended in 1923, creates an entirely new form of school district,
not bound by the provisions of the General School Law, except
where expressly stated; and, that the terms of the Consolidated
School Act, show an intent on the part of the legislature to take
from detached territory, the right to participate in the distric-
tutive share of the wealth of the Consolidated District, unless
such detachment be a part of a complete dis-continuance of the
consolidated district, and the re-organization of the town-
ship or school district, of which it is composed under the
provisions of Section 341 of the Act of 1919, as amended in
1923. This last position assumed by appellants, is based
upon the act of 1919, as amended in 1923, by which
it is provided that in the event of the dissolution of a
school district of which it is composed, then the

of the consolidated district, and that there may be a distribution of the money on hand, and of the real and personal property.

The changing of boundaries of common school districts, either by detachment or annexation of territory, or by combining districts have long formed a part of our school laws. Community Consolidated School Districts, created under the Act of 1919, or the Act of 1923, as amended, are and do constitute School Districts forming a part of our system of free schools; that this is true is especially stated in Section 64 of the Act of 1923. Although the school law, consists of separate acts and of different articles and sections, yet inasmuch, as the school system has been established and maintained under one constitutional provision, these laws must be considered and construed together. As heretofore applied to the common district schools, as it has existed, throughout the state, it has been the rule as well as the policy upon detachment of territory from such a school district, to permit the detached territory to share in the school property which remained unexpended at the time of the separation. Since the Community Consolidated School District, created under the Act of 1919 or the Act of 1923, constitutes school districts, forming a part of our system of free schools, it is the contention of appellants that for the purposes of this proceeding, it occupies the same position as the ordinary common school district, in relation to Sections 64 and 65 of the School Law. The Community Consolidated School Act, does not provide for any new form of school district that would take it out of the provisions of Sections 64 and 65 of the School Law. In discussing the act under which a Community Consolidated School was organized in *People vs. Exton*, 298 Ill. 119, at page 121, the Court said: - "While the Act is called an Act to Amend the general School Law, it does not change, ~~the~~^{its} form, revise, correct or modify any provisions of the general school law, or purport by its language to do so. The Act gave to a district, to be organized under the added section the same powers and duties as other school districts, under the school law, which remained the same, and some added powers were given to the districts,

The changing of boundaries of common school districts, either by detachment or annexation of territory, or by combining districts have long formed a part of our school laws. Community Consolidated School Districts, created under the Act of 1919, and the Act of 1925, as amended, are and do constitute a part of our system of free schools; that this is true is especially stated in Section 64 of the Act of 1925. Although the Act of 1925, as amended, provides for different articles and sections, yet inasmuch as the school system has been established and maintained under one constitutional provision, these laws must be considered and construed together. As heretofore applied to the common district schools, as it has existed, throughout the state, it has been the rule as well as the policy upon detachment of territory from such a school district, to permit the detached territory to share in the school property which remained unexpended at the time of the separation. Since the Community Consolidated School Districts created under the Act of 1919 or the Act of 1925, constitute a part of our system of free schools, it is the contention of appellants that for the purpose of this proceeding, it occupies the same position as the ordinary common school district, in relation to Sections 64 and 65 of the School Law. The Community Consolidated School Act, does not provide for any new form of school district that would take it out of the provisions of Sections 64 and 65 of the School Law. In the act under which a Community Consolidated School District was organized, People vs. Exton, 228 Ill. 119, at page 121, the Court said: "While the Act is called an Act to Amend the School Law, it does not change the form, nature, or purpose of any provision of the general school law, or purports to do so. The Act gave to a district, to be organized under the added section the same powers and duties as the school district, under the school law which remained in force. Some added powers were given to the district."

so organized. If the act should be regarded as adopting, other portions of the school law, that is the method of legislation, free from constitutional objections; * * * * * but this Act was not even of that character, since it simply added to the school law the sections and specifically gave to the districts organized under it, the rights and powers of the whole act, etc." A similar statement is also found in People vs. Shultz, 298 Ill. 125. In the Shultz case it was urged that section 46 of the general act provided for consolidation, and that because the Act of 1919 also provided for consolidation, it must be supposed that the legislature intended ~~the~~ repeal of section 46. In discussing this question the the court at page 127 said:- "We are unable to see the force of this argument. It was evident that the legislature, in enacting Sections 84a to 84g of the School Law, intended to add other means then those existing by which consolidation of school districts may be had, and the fact that it made provision for the consolidation of such districts, as lie in different counties, which was not provided for in section 46, does not establish that the legislature intended to repeal Section 46 or that the application of the Act is limited to such districts. * * * * * The Act of June 24, 1919, granted additional means for the consolidation of school districts."

In People vs. Moyer, 298 Ill. 143-145, the court defines the status of the Act of 1919, as follows:- "The Act does not purport to be an independent act, but an amendment of a previous statute." In view of the rule announced, the Act of 1919, together with the amendment thereto in 1923, added but one thing to our existing school law, namely: Another method of effecting consolidation, and ~~in~~ ^{the} corollary ~~a~~ ^{new} method of changing the boundaries of the district after it ~~is~~ ^{was} formed. In all other respects the legal characteristics of a Community Consolidated District, are the same as those of any other common school district. The standards for its teachers and text books are the same; the discipline of the pupils and the course of the studies ~~is~~ ^{are} the same; it levies and receives tax money in the same manner; it pays its bills in identically the same

... It is not to be regarded as a...
... of the school law, that is the method of legislation,
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general act provided for consolidation, and that because the
Act of 1919 also provided for consolidation, it must be supposed
that the legislature intended a repeal of section 46. In dis-
cussing this question the court at page 124 said: "We
are unable to see the force of this argument. It was evident
that the legislature, in enacting Section 46 to 84 of the
School Law, intended to add other means than those existing
by which consolidation of school districts may be had, and the
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way, and has its identity with other school districts, single or consolidated, under the school laws of 1857, 1865, 1909 and 1917. The form of the method of consolidation itself, is new, but not the substance of the district thereby created.

The conclusion reached from the opinions of the court in the cases last above cited is, that not having created anything new, nor having changed or modified the provisions of the general school law, such provisions may be applied to community consolidated districts, as well as ordinary districts, where the facts are such as to warrant their application. Sections 64 and 65, of the General School Law, would therefore be applicable to the situation found in the case at bar, unless there be a contrary intent to exclude these two sections shown in the wording of the act of 1919. Section 841 of the Act of 1919, makes provision for the discontinuance of a Community Consolidated District and its re-organization into the former districts of which it was composed, and makes the further provision that on such dissolution of the consolidated district, and the re-organization of its component parts, all outstanding obligations shall be discharged and a distribution of the remaining assets to the former underlying districts in proportion to the assessed valuation of their respective taxable properties.

It is the contention of appellees that because the Act of 1919 specifically makes provision for distribution in the event of dissolution, that it impliedly excludes the right to distribution in all other cases where a new district is created out of a part of the consolidated district. To so hold would be an acknowledgment of the repeal of said Sections 64 and 65 by implication, and repeals by implication are not favored. The contention of appellees in this respect is greatly weakened when we consider the language used in *People vs. Moyer, Supra*, wherein ^{it is held that} the status of the Act of 1919, is defined, ~~to be~~ "The Act does not purport to be an independent Act but an amendment of the ^a previous Statute."

In view of the rule that the school law must be considered and construed as one entire act, we can see what the Legislature evidently had in mind when Section 841 of the Act of 1919 was adopted. It was recognized that in the event of the dissolution of a community consolidated school district, that there was a discrepancy in the law, and since the school law provided a means of adjusting the property interests of districts that were formed from a part of a district or parts of two or more districts as evidenced by Sections 64 and 65, they would provide a means for taking care of the respective districts in the event of a dissolution of a community consolidated school district.

It will be remembered that at the time of the enactment of the provisions of Sections 64 and 65, and up to the time of the adoption of the Act of 1919, our school law had never provided for the dissolution of a consolidated district into its component parts. This form of dis-incorporating a consolidated district and the incorporation of its integral parts, was first brought into being by the Act of 1919, and Sections 64 and 65 had no clearly defined provision under their terms for distribution in the event of such dissolution as the Act of 1919 authorized. Therefore the Legislature must have considered and recognized that a discrepancy existed in the law and made provision for it in the sections which create the new situation. It is urged by appellee that Section 64 requires as a condition precedent, that the new district must be formed by the trustees or by the superintendent of schools, and it is insisted that the appellants' districts were not so formed.) It will be remembered that Section 84g of the Act under consideration provided "If three fourths of the legal voters of such district shall vote in favor of detachment, then the county superintendent of schools shall thereupon detach said territory and organize the same into common school districts." In the case of the People vs. Lukenbill 314 Ill. 64, at page 69 the court in discussing the Act of 1919, said, "By the Act of 1919, Community Consolidated School Districts were organized under the direction of the county

superintendent of schools. Amended section 840 provides that all petitions for the detachment of territory from such district, shall be presented to the county superintendent under whose direction the district was established. This language applies to districts already organized, as well as to districts to be created in the future. The amended section gives the county superintendent exclusive power in his discretion, in specified cases, to change the boundaries of community consolidated school districts."

Appellants contend that on the detachment of territory from a school district, control of the school property, in the absence of legislation making a division of the property, lies in the territory in which it happened to fall because of such detachment; ^{that under} ~~under~~ the facts in this case the rule of the common law obtains, and that rule leaves the property where it is found. The legislature evidently recognized such rule at the ~~time~~ of the adoption of said section 85. If the rule was not so recognized, what reason could the legislature have had for providing in section 85 for an appraisal of the property and a charge against the district wherein found, and a proportional credit in favor of that district in which it no longer lies? It appears that section 85 was enacted with a view of supplying a manner of procedure which the common law failed to provide. The rule as above contended for, by appellants, has in our opinion, been recognized by the courts of this state. The annexation of territory to a municipality does not carry with it the necessity of formulating a code of municipal laws for the territory annexed. By becoming a part of the municipality it is ipso facto brought under and made subject to all the laws by which the municipality itself is governed. *McCurn vs The Board of Education*, 133 Ill. 123.

In the case of *Cravener vs The Board of Education*, 133 Ill. 45, the court said: "By virtue of the annexation of the town of Lake to the City of Chicago, the Board of Education of the City of Chicago became vested with exclusive jurisdiction over the public schools within the town of Lake." The rule is also recognized in *Mobile and Ohio Railroad Company vs Fraser*, 169 Ill. App. 210-217. Where a new school real district is created including within its boundaries a school house or other/

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... vs The Board of Education, 133 Ill. 132.
... In the case of Oranier vs The Board of Education, 133 Ill.
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... as City of Chicago, the Board of Education of the City of Chicago
... is vested with exclusive jurisdiction over the public schools within
... town of Lake." The rule is also recognized in Mobile and Ohio
... Company vs Treasurer, 108 Ill. App. 210-217. Where a new school
... is created including within its boundaries a school house or other

ing to a previously existing district such real estate
estate becomes the property of the new school district. Pass School District vs. Hollywood City School District, 156 Calif. 416: Vol. 20 Am. & Eng. Anno. cases 87. This case announces the rule to be that the old corporation will hold all of the corporate property within her new limits and the new corporation will hold all the property falling within her boundaries.

In Pass School District vs. Hollywood City School District, Supra, it appears that Pass School District, for many years had been a school district in Los Angeles County. In 1889 the real property in controversy was deeded to the Trustees of the Pass School District, to be used as a school house lot and ground. For such purposes the Pass School District held and used the property until November 1903, when the City of Hollywood was incorporated, with which incorporation came into existence the Hollywood City School District. The school property in question was included on the incorporation of the city of Hollywood and the organization of the Hollywood City School District, within the corporate limits of the latter. The remaining portion of the Pass School District, not within the corporate limits of the city of Hollywood, continued as a school district under the name of the Pass School District. In a decision of this case the court among other things said: "The question presented may be thus stated: what, under the indicated circumstances, is the disposition made by the law of the real property of such corporation owned and used for the corporate purposes, when, by a change in the boundaries, that property falls within the territorial limits of the new corporation organized for identical purposes? Or, wording it differently, did the title, dominion, power and control over the land in controversy pass to the Hollywood City School District, or did they remain where formerly they had been, with the Pass School District? So far as this state is concerned this question would seem to have been conclusively answered in favor of respondent by such cases as Los Angeles County vs. Orange County, 97 Calif. 329 and Vernon School District vs. Board of Education 125 Calif. 593. The last case is directly in point. It was an action brought to quiet title by the Vernon School District to lands used for school purposes.

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answered in favor of incorporation by such cases as Los Angeles

County vs. Los Angeles County, 105 Cal. 389 and Vernon School

District vs. City of Hollywood, 125 Cal. 508. The last case

originally within the territorial limit of the district but subsequently, by annexation falling within the corporate limits of the city of Los Angeles. It is there said that 'in the absence of statutory provisions, governing the ownership of municipal property, upon the division of a municipality, municipal property consisting of real estate, belongs to the municipality within which it is located by the division.' * * * * * The legislative power being full and complete, over the matter, as a part of that power, it may make provision for the division of the property and apportionment of the debts of the old corporation, when a portion of its territory and public property are transferred to the jurisdiction of another corporation. But in the absence of such provision the rule of the common law obtains and that rule leaves the property where it is found, etc." The opinion in the Pass District case is a well considered one, and is in our opinion, supported by the weight of authority. The Pass District case finds support in *People vs. Bartlett*, 304 Ill. 283-287.

In passing it is proper to here state that the *Bartlett* case does not support the contention of appellees, although they cite it and quote quite freely from the opinion in their argument. According to our view of the *Bartlett* case, the court, when it said "So if a part of its territory and some of its inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation retains all its property, powers, rights and privileges," was speaking only of the property remaining in the old district. We have examined the authorities relied upon by appellees, and the rules announced therein, and notwithstanding what has been said in support of the decisions, relied upon by them, we are convinced that their contention is not supported by the weight of authority. To discuss the decisions relied upon by appellees would unduly extend this opinion. From an examination of the books we have concluded that in the absence of legislation or an agreement to the contrary, property of a school district, which by reason of the alteration of its boundaries, falls within the boundaries, or within the jurisdiction of another school district, or a

originally within the territorial limits of the district and
... by annexation falling within the corporate limits
of the city of Los Angeles. It is there said that 'in the
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municipal property, upon the division of a municipality, municipal
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legislative power being full and complete, over the matter, as
a part of that power, it may make provision for the division of
the property and apportionment of the debts of the old corpora-
tion, when a portion of its territory and public property are
transferred to the jurisdiction of another corporation. But in
the absence of such provision the rule of the common law obtains
and that rule leaves the property where it is found, etc." The
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is in our opinion, supported by the weight of authority. The
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In passing it is proper to here state that the District case
does not support the contention of appellants, although they also
it and quote quite freely from the opinion in their argument.
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said "So if a part of its territory and some of its inhabitants
are separated from it by annexation to another, or by the creation
of a new corporation, the former corporation retains all its prop-
erty, powers, rights and privileges," was speaking only of the
property remaining in the old district. We have examined the
authorities relied upon by appellants and the rules announced
therein, and notwithstanding what has been said in support of
the decisions, relied upon by them, we are convinced that their
opinion is not supported by the weight of authority. To
the decisions relied upon by appellants would hardly
support this opinion. From an examination of the books we have
found that in the absence of legislation or an agreement
between the parties, property of a school district, which by reason
of the annexation of its boundaries, falls within the boundaries

city having a board of education in which school property is vested, becomes the property of the district or city to which it is annexed. We have further concluded that a consolidated school district is no different in substance than a common school district and subject therefore to all general enactments of the school law. If ^{the} consolidated district had incurred bonded obligations such obligations would have followed the detached territory in whatever form it might later be incorporated, and this under the express provisions of the general school law. If detached territory can and should not escape its obligations created before the detachment, the detached territory should be allowed to share in the fund and property created before detachment. We, therefore, are of the opinion, that the Circuit Court of Winnebago County erred in sustaining the demurrer to the petition and the judgment of said court will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of December,

in the year of our Lord one thousand nine hundred and sixty one.

Paul V. Wunder

Clerk of the Appellate Court.

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 642³

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

Journal of the

Board of Directors of the

City of New York

for the year ending

1900

1900-1901

1901-1902

1902-1903

1903-1904

Emma L. Sharpe,
Plaintiff in Error,

Error to the Circuit Court
of Woodford County.

vs.

Illinois Bankers Life Association
of Monmouth, Illinois
Defendant in Error.

ett. J.

238 I.A. 642

Emma L. Sharpe, plaintiff in error, instituted suit on two certificates of membership of insurance each for \$3,000.00, issued by Illinois Bankers Life Association of Monmouth, Illinois, defendant in error on the life of Claude Homer Sharpe. The application for the insurance, among other things, provided that death while in the service in the Army or Navy of any government was not a risk covered at any time during the continuance or reinstatement of any policy to be issued on the application. The certificate issued, does not contain any such provision. Claude Homer Sharpe, the insured died in a training camp of the United States from influenza on October 6th, 1918. The cause was tried before the court without the intervention of a jury upon a stipulation of facts. The court held that the death of the insured was not a risk covered by the policy but rendered judgment against the defendant in error for \$228.27, the amount of the premiums that had been paid on the certificate of insurance, and from which holding of the court, plaintiff in error has sued out this writ. A motion has been made by the defendant in error to strike from the record the so-called bill of exceptions on the ground that the alleged bill of exceptions was not signed by the trial judge. The record is signed by the clerk of the trial court and is not signed by the trial judge. The stipulation of facts upon which the cause was tried, is made a part of the record as signed by the clerk. It has been uniformly held that a stipulation upon which a case was tried can only be preserved by a bill of exceptions. Stipulations of parties can be made a

Plaintiff in Error,
at Chicago, Illinois.

L. E. Sharpe,
Plaintiff in Error,

Illinois Bankers Life Association
Defendant in Error.

3381A.642

That L. E. Sharpe, Plaintiff in Error, insured his life with the Illinois Bankers Life Association of Chicago, Illinois, for the sum of \$10,000.00, under a policy of insurance which provided that death benefits should be paid to the beneficiary named in the policy, provided that death should occur while the insured was in the service of the Army or Navy of the United States, or while he was engaged in any business or occupation in which he was engaged at any time during the continuance of his membership in the association. The policy provided that the amount of the premium should be paid to the association, and that the association should not be liable for the death of the insured unless he died in a training camp of the United States Army, or on October 8th, 1918. The cause was tried before the court on the intervention of a jury upon a stipulation of facts. The court held that the death of the insured was not a risk covered by the policy and rendered judgment against the defendant in error for the amount of the premium that had been paid on the policy of insurance, and from which the court held that the plaintiff in error had sued out this writ. A motion was made by the defendant in error to strike from the record the so-called stipulation of facts on the ground that the alleged stipulation was not signed by the trial judge. The record is signed by the clerk of the court and is not signed by the trial judge. The stipulation of facts upon which the cause was tried, is made a part of the record as shown by the clerk. It has been uniformly held

part of the record only by a bill of exceptions. Eureka Coal Company, vs. Power, 10th Ill. App. 61. A bill of exceptions which is not signed and sealed by the judge of the court below will not be considered a part of the record. Facts admitted by stipulation in order to become part of the record must be embodied in a bill of exceptions. Chicago and Northwestern Railway Company vs. Benham, et al 25th Ill. App. 248. Stipulations to be made a part of the record so as to be subject to examinations in this court, should be embodied in a bill of exceptions. Wilson vs. McDowell, 65 Ill. 522; People vs. Coultas, 9th Ill. App. 39. ~~Motions~~, appeal bonds and other instruments introduced, in evidence and which are not part of the record proper, or preserved by any bill of exceptions or certificate of evidence cannot be considered by a court of review although copied in the record by the clerk of the lower court. The People ex rel, County of Peoria, vs. Harrigan 291 Ill. 206. The evidence upon which this case was tried is not properly before this court and there is nothing before us except the common law record as signed by the clerk. The motion of the defendant in error to strike from the record that portion which should be covered by a bill of exceptions is sustained and in the absence of any evidence properly preserved by a bill of exceptions, we must assume that there was sufficient evidence before the trial court to sustain the judgment rendered and for this reason, the judgment, of the circuit court of Woodford County will be affirmed.

Judgment affirmed.

of the record only by a bill of exceptions. *People v. Davis*
1897, 100 Cal. 100. A bill of exceptions will
not be considered by the court unless it is
presented to the court by the party who
presented a bill of the record. *People v. Davis*
order to remove part of the record may be made in a bill
of exceptions. *People v. Davis* 100 Cal. 100.
A bill of exceptions is not a bill of exceptions
and as to be subject to a bill of exceptions
it is not a bill of exceptions. *People v. Davis*
1897, 100 Cal. 100. A bill of exceptions is
in and when a bill of exceptions is presented, it is
part of the record proper, and preserved by any bill of exceptions
verification of evidence cannot be considered by a court of review
except copied in the record by the clerk of the lower court. *The*
People v. Davis, 100 Cal. 100. The
times upon which this case was tried in the lower court
a court and there is nothing before or except the common law
and as signed by the clerk. The motion of the defendant in
to strike from the record a bill of exceptions which should be removed
a bill of exceptions is sustained and in the absence of any evidence
people preserve the bill of exceptions, we must assume that there
sufficient evidence before the trial court to sustain the judgment
entered by the trial court, the judgment, as the circuit court of
the circuit court is affirmed. *People v. Davis*
1897, 100 Cal. 100.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
August in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.



16
Rehearing denied October 6, 1925.
Abstract only.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 642⁴

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:



242-1-112

Moses Fleet,
Appellant,

vs.

Illinois Central Railroad
Company, Appellee.

Jett J.

Appeal from Kankakee

County Circuit Court.

238 I.A. 642

This was an action in case for personal injuries. The declaration consisted of four counts and alleged in varying language that both parties were engaged in interstate commerce and that appellant was employed by appellee, a common carrier, as a laborer in repairing its north bound main track; that with other laborers, appellant was engaged in cutting a rail; that a chisel which was old, battered and crystalized was used therefor and that appellee had knowledge of the condition of said chisel and while the chisel was being struck by a maul, appellant, while using due care for his own safety was struck in the eye by a small particle of iron or steel which was dislodged from said chisel and as a result thereof the sight of appellant's eye was destroyed. To this declaration appellee filed the general issue, a hearing was had and at the close of all the evidence, in obedience to a peremptory instruction, the jury returned a verdict in favor of appellee in bar of the action and for costs, upon which verdict a judgment was rendered and the case comes to this court by appeal.

The evidence disclosed that appellant was a common laborer and had been a member of a section gang in the employ of appellee for about one year prior to October 4, 1921 and had been employed at similar work for other railroads for ten years. On October 4, 1921, appellant, under the direction of his foreman, with other men, was engaged in repairing a track and it became necessary to cut a steel rail to be used to replace another rail which had been torn up in a wreck early that morning. The rail which was being cut was resting on a block five or six inches high

Appeal from Kentucky
County Circuit Court.

as filed,
Appellant,
Illinois Central Railroad
Company, Appellee.

3381.A.643

This was an action in case for personal injuries. The
complaint contained of four counts and alleged in varying lan-
guage that both parties were engaged in interstate commerce and
that appellant was employed by appellee, a common carrier, as a
conductor in operating its north bound main track; that with other
conductors, appellee was engaged in carrying a train; that a signal
on was out, battered and crippled and was used thereafter and that
appellee had knowledge of the condition of said signal and while
appellee was being struck by a train, appellee, while acting
as a conductor for his own railway was struck in the eye by a small iron
rod or piece of steel which was dislodged from said signal and
a result thereof the right of appellee's eye was destroyed.
This declaration appellee filed the general issue, a denial
that and at the close of all the evidence, in substance as
excepted instruction, the jury returned a verdict in favor
appellee in bar of the action and for costs, upon which ver-
dict a judgment was rendered and the case came to this court
for appeal.

The evidence disclosed that appellee was a common
conductor and had been a member of a section gang in the employ
of appellee for about one year prior to October 4, 1931 and
had been employed at that time with other railroads for and
before. On October 4, 1931, appellee, under the direction of his
superior, with other men, was engaged in repairing track and it
was necessary to cut a steel rail to be used to replace another

and was lying parallel with the east north bound rail about five inches from it. The foreman was holding the chisel and one of the other men was striking the chisel with a sledge while appellant, only a few feet away was bearing down with a bar upon the rail which was being cut, the point of his bar being under the fastened rail. Immediately after one of the blows was struck a small particle of steel or iron came in contact with the right eye of appellant and the injury was such that on December the 13th following, it was necessary to remove the eye. Appellant testified that prior to his injury both of his eyes were in good condition but that since the accident his left eye pains him at times and that he cannot read very well at night; that he was idle from the time of the accident until August 1922 and was receiving \$3.16 for ten hours' work at the time of the injury.

The evidence on behalf of appellant tended to prove that at the time of the injury he was working in obedience to the directions of his superior; that the top of the chisel which was being used was battered and there were spurs or burs and splinters on it; that appellant asked the foreman about having the heads fixed up but the foreman said "no" and directed him to take them to the blacksmith and have them pointed up or sharpened, which he did; that there was no regular chisel handle upon the chisel which was being used at the time of the accident but it had a handle which appellant had put on himself; that while in his work appellant had assisted in cutting rails quite often he had never cut them or assisted in cutting them in the exact way in which this was done; that in the method ^{with} which he was familiar no bars were used but a groove was cut with a maul and chisel and then the rail dropped.

The evidence on behalf of appellee tended to prove that while the head of the chisel was battered a little there were no burs or splinters on it and that the method employed to cut this rail was known as "snapping" and had been in use eight or ten years and was a safer and less dangerous method than "dropping", the method

I was lying parallel with the east north bound rail about
inches from it. The foreman was holding the chisel and one

the other man was striking the chisel with a sledge
the sledge, only a few feet away and leaning down with a
upon the rail which was being cut, the point of his bar
under the fastened rail. Immediately after one of the
was struck a small particle of steel or iron came in contact
the right eye of appellant and the injury was such that on
after the 13th following, it was necessary to remove the eye.
I have testified that prior to his injury both of his eyes were
in good condition but that since the accident his left eye pains him
and that he cannot read very well at night; that he was
from the time of the accident until August 1903 and was receive-
\$2.10 for ten hours' work at the time of the injury.

The evidence on behalf of appellant tends to show that
the time of the injury he was working in obedience to the direc-
s of his superior; that the top of the chisel which was being
was battered and there were splinters on it;
appellant asked the foreman about having the heads taken up
the foreman said "no" and directed him to take them to the
smith and have them pointed up or sharpened, which he did;
there was no regular chisel handle upon the chisel which
being used at the time of the accident but it had a handle which
appellant had put on himself; that while in his work

appellant had assisted in cutting rails since often he had never cut
or assisted in cutting them in the exact way in which this was
with
that in the method which he was familiar with he was used but
have was cut with a small end chisel and then the rail dropped.
The evidence on behalf of appellee tended to prove that
the head of the chisel was battered a little there were no
or splinters on it and that the method employed to cut the

bars hold the rail down with all their strength causing the rail to snap where marked with the chisel.

Appellee contends that appellant entirely failed to allege or prove a cause of action. Both parties agree that the Federal Employer's Liability Act governs this case and that under it the doctrine of assumption of risk by an employee applies and prevails as at common law but appellant insists that this doctrine of assumed risk does not apply to the facts as disclosed by the record in this case because, first, the risk out of which the injury arose was not one of the ordinary and usual risks incident to his employment and second, appellant was working under the specific directions of his superior at the time of his injury.

Appellant insists that it was an unusual and extraordinary risk because, first a big wreck had previously occurred and the foreman were pushing the repairs rapidly, second, that the tools used including the chisel, were not the regular tools of this section gang but emergency tools and third, that the usual method in cutting rails was not employed but the quicker method known as "snapping". None of these reasons, in our opinion, make this risk an extraordinary or an unusual one, The wreck may have been an extensive one, the tools may have been used only in emergencies and the method employed may have been by "snapping" but appellant's injury was caused by a particle of metal coming in contact with his eye and whether the "snapping" or "dropping" method was used a chisel and maul or sledge were used to nick or groove the rail and it was while this was being done that appellant received his injury, furthermore the undisputed evidence disclosed that appellant knew of the condition of the chisel, he had taken it, with others to a blacksmith and had it sharpened and had called the attention of his foreman to the battered condition of its head. "It is well understood, that as between employer and employee, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective

...the rail down with all their strength causing the rail
...where curved with the chisel.

Appellant contends that appellant entirely failed to
...of prove a cause of action. Both parties agree that the

...Appellant's liability and negligence in this case and that under
...the doctrine of assumption of risk by an employee applies and

...while as it comes for appellant insists that this doctrine
...assumed risk does not apply to the facts as disclosed by the

...in this case because, first, the risk was not assumed
...by those present one of the ordinary and usual risks incident

...is employed and second, appellant was negligent in failing to
...the direction of his superior at the time of his injury.

...appellant insists that it was an unusual and extraordinary
...risk because, first a big wheel had previously reversed and

...foremen were passing the repairs rapidly, second, that the
...used including the chisel, were not the regular tools of

...section had not emergency tools and third, that the small
...in causing this was not employed but was a quick method

...as "snapping". Some of these reasons, it is claimed, were
...risk an extraordinary or an unusual one. The wheel may have

...an extensive one, the tools may have been used only in emergen-
...and the method employed have been by "snapping" but

...Appellant's injury was caused by a particle of metal coming in
...and with his eye and whether the "snapping" or "dropping" method

...used a chisel and metal or wedge were used to raise or groove the
...and it was while this was being done that appellant received

...injury, furthermore the undisputed evidence indicates that
...that one of the employees of the chisel, he was using it with

...to a chisel and that it was pushed and not pulled the other
...of the fact that the injured condition of his hand is

...indicated, that on between employer and employee, the latter

tools and machinery, if, after the employment, he knows of the defect but voluntarily continues in the employment without objection."

Swift & Co., v. O'Neill, 187 Ill. 337. The servant will be regarded as voluntarily assuming the risks resulting from the use of defective machinery if its defects are as well known to him as to the master. Wheeler v. C. & W. I. R. R. Co. 267 Ill. 306. The servant assumes all the ordinary risks of the service and all the extraordinary risks of which he knows and the danger of which he appreciates but extraordinary risks, - that is, risks which may be obviated by the exercise of reasonable care on the master's part, - are not assumed by the servant unless they are, or ought to be, known to and comprehended by him. He only assumes the risks of known dangers and such as are obvious that knowledge of their existence is fairly to be presumed, but the dangers must be known to him and where the danger arising from the defect would be obvious to a person of ordinary intelligence the law will charge him with knowledge of the danger. Wheeler v. C. & W. I. R. R. Co. Supra. Where a servant is engaged in work which necessarily results in causing particles of iron to fly around, he, if a man of ordinary intelligence and mature years, assumes the risk of dangers from such chips and the master owes him no duty to warn him of what is necessarily an obvious danger. Barrett v. Chicago Bridge & Iron Co., 181 Ill. App. 204; Ill. Central Ry. Co. v. Brown, 107, Ill. App. 512.

It is next insisted by appellant that the doctrine of assumed risk does not apply inasmuch as he, at the time of his injury was working under the direct and specific directions of his superior. The evidence discloses that supervisor Gallagher told appellant to get a bar and in compliance with this request appellant procured one and took the position he was in at the time he was injured. In obeying this direction appellant cannot be said to have assumed the risk of being injured unless the danger was so manifest that an ordinarily prudent man would not have encountered it.

is and machinery, it, after the explosion, he knew of the defect
voluntarily continues in the employment without objection.
It is Co. v. Smith, 187 Ill. 287. The servant will be re-
sponsible for voluntarily assuming the risk resulting from defects of
active machinery if the defects are as well known to him as to
master. Wheeler v. C. & W. R. Co., 187 Ill. 290. The ser-
vant assumes all the ordinary risks of the service and all the
extraordinary risks of which he knows and the danger of which he
realizes but extraordinary risks, - that is, risks which are
omitted by the exercise of reasonable care on the master's part,
not assumed by the servant unless they are, or ought to be,
to be and comprehended by him. He only assumes the risk of
a danger and even in the obvious that knowledge of their
existence is fairly to be presumed, but the danger must be
to him and where the danger is not to him the master is
not to a person of ordinary intelligence the law will charge
with knowledge the danger. Wheeler v. C. & W. R. Co.
ca. Where a servant is engaged in work which necessarily requires
certain particles of iron to his thread, say, if a man on ordinary
intelligence and native prudence, assumes the risk of danger from
a coil and the master owes him no duty to warn him of what is
essentially an obvious danger. Barrett v. Chicago & N. W. Ry.
Co., 187 Ill. 287. Central Ry. Co. v. Brown, 187 Ill.
287. It is held that of appellant that the doctrine of
assumed risk does not apply inasmuch as he, at the time of his
injury was working under the direct and specific direction of his
master. The evidence discloses that appellant believed that he
ought to get a bar and in compliance with this request appellant
went and saw and took the position he was in at the time he was
injured. In showing this direction appellant cannot be said to have

Appellant may have known that particles of iron or steel might be dislodged yet the order of his superior to get the bar and assume the position which he did would relieve him of the assumption of the risk unless the danger was so manifest that a person of ordinary prudence would not have incurred it. *Gundlach V. Schott*, 192, Ill. 509. The servant's duty is obedience and when acting under an order he assumes no risk unless he acts recklessly in obeying it and whether he acted recklessly or as a reasonably prudent person should act under the same circumstances are questions of fact to be determined by the jury. *Western Stone Co. v. Muscial*, 196 Ill. 382.

On questions of fact, in an action at law, it is for the jury to weigh and determine the evidence admitted by the court as competent. The right to try by jury questions of fact in common law actions has always been recognized, and a trial court is never authorized to take a case from the jury where there is legitimate evidence tending to prove the cause of action. When a motion is made to direct a verdict it is not the province of the trial court to weigh and determine the preponderance of the testimony. It has been held in many cases that such a motion raises a question of law and the function of the trial court is limited strictly to determine whether there is or is not evidence legally tending to prove the facts alleged. If there is such evidence the case must be submitted to the jury. *Mirich v. Forschner Contracting Co.* 312 Ill. 343.

The evidence in this case tended, in our opinion, to establish a cause of action. Whether the risk was usual and ordinary or whether or not the plaintiff assumed this risk and whether or not the plaintiff was or was not acting under the direction of and in obedience to his superior were all questions of fact to be determined by the jury under proper instruction, and it was the right of appellant to have a jury pass upon these questions and for the error of the lower court in depriving appellant of this right the

6.

judgment will be reversed and the cause remanded for a new trial.

Reversed and Remanded.

Cost will be reviewed and the same remanded for a new trial.

Revised and Enlarged

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 642⁵

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

215 МОСКОВ

Charles R. Withrow,

appellee,

vs.

Appeal from Circuit Court

of Henry County.

John N. Miller,

appellant.

238 I.A. 642

Jett, J.

In the fall of 1919, George O. Withrow entered into a contract with W. L. Miller to purchase a farm, the transfer to be completed on March 1, 1920. On that date an objection to the abstract of title having been made, the defendant in this suit, who is a brother of said W. L. Miller, executed the note upon which this suit is instituted. By its terms the maker, John N. Miller, promised to pay to the order of George O. Withrow ten months after date the sum of \$500.00 with six per cent interest from ~~the~~ maturity. It is the contention of appellant that this note was delivered by him to the payee to indemnify him in the event his brother, W. L. Miller, did not have the abstract of title to the farm completed so as to show a merchantable title and that subsequently the title was corrected and the abstract thereof completed, so therefore the consideration of said note failed.

The trial court, a jury having been waived, found that appellee was the holder and owner of said note for value having received it before maturity and without notice of any defenses that might be interposed by the maker and accordingly rendered judgment in favor of appellee for the full amount due thereon. From this judgment an appeal has been perfected to this court.

Appellee was 22 years of age on December 24, 1920, is married and is the son of George O. Withrow. He testified that during the year 1920 he was employed by his father on his farm receiving for his services \$50.00 per month; that on December 23, 1920, he and his father had a settlement and his father being indebted to him in the sum of \$500.00 endorsed this note and delivered it to him in full

Charles A. Miller,

Appellant,

Appeal from Circuit Court

of Henry County.

vs.

John E. Miller,

Appellee.

Case No. 112.

2381.A.642

In the fall of 1919, George O. Miller entered into a contract

with W. L. Miller to purchase a farm, the transfer to be completed

on March 1, 1920. On that date an objection to the abstract of

title having been made, the defendant in this suit, who is a brother

of said W. L. Miller, executed the note upon which this suit is

instituted. In the same note, John E. Miller, president of

the order of George O. Miller was made after the date

of \$500.00 with six per cent interest from maturity. It is the con-

clusion of appellant that this note was delivered by him to the payee

to indemnify him in the event his brother, W. L. Miller, did not

have the abstract of title to the farm completed as he is now

unable to title and that subsequently the title was corrected and

the abstract thereof completed, so therefore the consideration of

this note failed.

The trial court, a jury having been waived, found that appellee

was the holder and owner of said note the value being \$500.00

before maturity and without notice of any defenses that might be

interposed by the maker and accordingly rendered judgment in favor

of appellee for the full amount due thereon. From this judgment an

appeal has been perfected to this court.

Appellee was 22 years of age on December 24, 1920, is married

and is the son of George O. Withrow. He testified that during the

year 1920 he was employed by his father on his farm receiving for

his services \$50.00 per month; that on December 22, 1920, he and

his father had a settlement and his father being indebted to him in

payment of said indebtedness and he so accepted and received it and that he knew nothing about the consideration for which the note had previously been given his father. His testimony was corroborated by that of his brother John, and his mother and by other facts and circumstances in evidence.

On behalf of appellant the evidence tended to prove that appellee had full knowledge of the purpose for which the note was given.

W. L. Miller detailed a conversation with George O. Withrow at his (Withrow's) farm concerning the note and the purpose for which it was given; at which time appellee was present. That this conversation ever took place was denied by both George O. Withrow and by appellee. The mother of appellee denied that said W. L. Miller was at the place during the time he fixed when this conversation took place.

There were no propositions of law submitted to the trial court by either party. Appellant did request the court to find certain facts submitting to the court for that purpose six interrogatories, four of which the court marked "Held" and the remaining two were marked "Refused", there is therefore no question of law presented by this record but the only question in the case is one of fact as to whether appellee was a holder of this note in good faith, for value and without notice. We may have some grave doubts as to the correctness of the holding of the trial court upon this question but unless the findings and judgment are manifestly against the weight of the evidence, we must affirm the case. The trial judge saw and heard the witnesses, he was in a far better position than this reviewing court to correctly decide this question of fact. "It is well settled that the finding of a judge to whom a cause is submitted for trial without a jury is entitled to the same weight on controverted questions of fact as the verdict of a jury and will not be set aside by an appellate tribunal unless it is manifestly against the weight of the evidence (Haug v. Haug, 193 Ill. 645; Rademacher v. Greenwood, 114 Ill. App. 542), and that the finding of the judge trying the case without a jury, who saw the witnesses and heard them testify, is conclusive on all questions of fact if not manifestly

...of said indebtedness and as to whether or not it was
that he knew nothing about the consideration for which the note had
previously been given his father. His testimony was corroborated by
that of his brother John, and his mother and by other facts and cir-
cumstances in evidence.

On behalf of appellant the evidence tended to prove that appellee
had full knowledge of the purpose for which the note was given.
W. E. Miller detailed a conversation with George O. Withrow at his
father's farm concerning the note and the purpose for which it
was given at which time appellee was present. That this conversation
ever took place was denied by both George O. Withrow and by appellee.
The mother of appellee denied that said W. E. Miller was at the place
during the time he lived when this conversation took place.

There were no propositions of law admitted to the trial court
by either party. Appellant did request the court to find certain
facts relating to the court for that purpose six interrogatories,
two of which the court marked "Held" and the remaining two were
marked "Retained", there is therefore no question of law presented
by this record but the only question in the case is one of fact as
to whether appellee was a holder of this note in good faith, for
which said without notice. We may have some grave doubts as to the
correctness of the holding of the trial court upon this question but
unless the findings and judgment are manifestly against the weight
of the evidence, we must affirm the case. The trial judge saw and
heard the witnesses, he was in a far better position than this
court to correctly decide this question of fact. "It is
well settled that the finding of a judge in whom a cause is submitted
for trial without a jury is entitled to the same weight on contro-
verted questions of fact as the verdict of a jury and will not be
set aside by an appellate tribunal unless it is manifestly against
the weight of the evidence (Harg v. Harg, 128 Ill. 645; Redman v.
H. Greenman, 116 Ill. App. 543), and that the finding of the judge
which was made by a jury, who saw the witnesses and heard

against the weight of evidence." Moore v. Molloy Co., 222 Ill. App. 295.

Applying this accepted principal of law we must affirm this judgment.

Judgment Affirmed.

...the weight of evidence." Home & Valley, Vol. III, 1891.

1891

...this is a copy of the original of the law...

London, June 1891

Dear Sir,

1891

to ref

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
August in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

TUB L. JOHNSON, Clerk of the Appellate Court,
and keeper of the Records and Seal thereof,
by of the opinion of the said Appellate Court in

I herewith set my hand and affix the seal of
the Court of one Lord one thousand
Dated, this

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abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 643'

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

Clara Buckley,

appellee,

vs.

F. W. Graham, et al,

appellant.

Appeal from the Circuit Court
of Grundy County.

238 I.A. 643

Jett, J.

F. W. Graham, appellant, is an osteopath, and Clara Buckley, appellee, was for a number of years his patient. After having treated her for a considerable length of time, he borrowed \$1000.00 from her, and gave to her his promissory note for said sum, with W. O. Watts, and Clara E. Graham on the note. The note recites on its face that all signers are principals. A judgment was entered on the note by confession upon the warrant of attorney contained therein. Thereafter, appellant, Graham, entered his motion to open up the judgment and for leave to plead. In support of his motion, he filed an affidavit in which he stated that he was the principal maker of the said note and that the other signers of the instrument signed it as sureties, and that at the time the note was executed, appellee was indebted to him in the sum of \$571.00, the exact amount of which was not known to him or to appellee at the time of the execution of the note for the reason he did not have his book of account with him at the time and place where the note was executed; that it was understood and agreed that the said sum owing on said book account should be credited on said note; that appellant, rendered professional services to appellee up to and including the 25th day of July, 1919, that were reasonably worth \$193.00 and it was understood and agreed by and between appellee and appellant that appellant was to receive credit on said note for said professional services so rendered. The court overruled the motion to open up the judgment and this appeal followed. It is insisted by appellee that no error was committed by the court in overruling said motion because, (1) the claim set forth in the affidavit was an individual claim and could not be set-off

U.S. District Court,

appeals,

vs.

W. E. Graham, et al.,

appellant.

Appeal from the District Court

of Grundy County.

238 I.A. 643

1919.

W. E. Graham, appellant, is an outgrowth, and Clara Broome,

appellee, was for a number of years his patient. After having treated her for a considerable length of time, he borrowed from her \$500.00 and gave to her his promissory note for said sum, with interest.

Walter and Clara E. Graham on the note. The note recites on its face that all signers are principals. A judgment was entered on the note by the court upon the warrant of attorney contained therein. Thereafter, appellant, Graham, entered his motion to open up the judgment and for leave to plead. In support of his motion, he filed an affidavit in which he stated that he was the principal maker of the said note and that the other signers of the instrument signed it as

witnesses, and that at the time the note was executed, appellee was indebted to him in the sum of \$571.00, the exact amount of which was not known to him or to appellee at the time of the execution of the note for the reason he did not have his book of account with him at the time and place where the note was executed; that it was understood and agreed that the said sum owing on said book account should be credited on said note; that appellant, rendered professional services to appellee up to and including the 25th day of July, 1919, that were reasonably worth \$125.00 and it was understood and agreed that between appellee and appellant that appellant was to receive credit on said note for said professional services so rendered. The court overruled the motion to open up the judgment and this appeal allowed. It is insisted by appellee that no error was committed by

against the joint obligation of the makers of the note, and (2) that the execution of the cognovit is a bar to any set-off on account of demands then due, and (3) that the set-off cannot be allowed because it is barred by the statute of limitations.

Although the note recites that the makers are all principals, the affidavit discloses such is not the case. It is disclosed by the affidavit that Graham is principal and the other signers of the note are sureties; such being the case, any valid claim Graham may have against appellee could be set-off. *Samuel F. Engs, et al, vs. Matson*, 11 Ill. App. 639-640-643; *Weir v. Dustin*, 32 Ill. App. 388-391; *Himrod et al, v. Baugh*, 85 Ill. 435. As to the second contention of appellee, that the execution of the cognovit is a bar to any set-off on account of demands then due, she relies upon the case of *Gross v. Weary*, 90 Ill. 256. What is said in *Gross v. Weary*, supra, in our opinion is intended to apply only to the particular facts there involved, and the opinion is not to be interpreted as stating an abstract proposition of law, for it certainly cannot be a just rule of law to bar existing legal demands by the mere execution of a judgment note with warrant of attorney. The view expressed herein is confirmed by *Borchsenius v. Canutson*, 100 Ill. 82. Moreover, the affidavit discloses that \$193.00 of the set-off was for services rendered after the execution of the note in question, hence the rule contended for by appellee as announced in the *Gross* case, cannot be invoked against that part of the claim of appellant which accrued after the execution of the cognovit. As to the third contention it is our opinion, that if the agreement between the parties was to give Graham credit upon the note for his bill for services rendered both before and after the execution of the note, then the statute of limitations is not involved in the consideration of this case. The suggestion of appellant that judgment should not have been entered because the warrant of attorney had no Government stamps on it is wholly without merit. A warrant of attorney to confess judgment is not the character of instrument included within the term power of attorney as the same is used in the Internal Revenue Act. The

The court held that the joint obligation of the makers of the note, and (2) that the execution of the cognovit is a bar to any set-off on account of the note; and (3) that the set-off cannot be allowed because it is barred by the statute of limitations.

Although the note states that the maker is principal, the court held that such is not the case. It is disclosed by the affidavit that Graham is principal and the other signers of the note are sureties; each being the case, any valid claim Graham may have against appellee could be set-off. Samuel F. Hays, et al., vs. Watson, 11 Ill. App. 439-440; West v. Preston, 82 Ill. App. 366-367; Hays et al. v. Hays, 82 Ill. 438. As to the second contention of appellee, that the execution of the cognovit is a bar to any set-off on account of demands then due, the relief upon the case of Graham v. Weary, 90 Ill. 388. What he said in Green v. Weary, supra, in now opinion is intended to apply only to the particular facts there involved, and the opinion is not to be interpreted as stating an absolute proposition of law, for it certainly cannot be a just rule of law to bar existing legal demands by the mere execution of a judgment made with warrant of attorney. The view expressed herein is sustained by Berenshaw v. Gustafson, 190 Ill. 88. Moreover, the affidavit discloses that \$100.00 of the set-off was for services rendered after the execution of the note in question, hence the rule contended for by appellee as announced in the Green case, cannot be invoked against that part of the claim of appellant which accrued after the execution of the cognovit. As to the third contention it is my opinion, that if the agreement between the parties was to give Graham credit upon the note for his bill for services rendered both before and after the execution of the note, then the statute of limitations is not involved in the contemplation of this case. The objection of appellant that judgment should not have been entered because the warrant of attorney was not sufficient under the Illinois Code of Civil Procedure is overruled. A warrant of attorney to confess judgment is not the character of instrument included within the term power

affidavit presents a prima facie defense on the merits. The rule is that it is only necessary for a defendant to show a prima facie defense on the merits by his affidavit to be entitled to have the judgment opened and for leave to plead. *Stone v. Levinson*, 228 Ill. App. 342. This cause is reversed and remanded with directions to the trial court to open up the judgment and to grant leave to appellant to plead.

Reversed and remanded with directions.

attorney presents a prima facie defense on the merits. The rule is that it is only necessary for a defendant to show a prima facie defense on the merits by his affidavit to be entitled to have the judgment opened and for leave to plead. *Stam v. Postman*, 200 Ill. App. 100. This case is covered and rounded with discussion in the trial court to open the judgment and to grant leave to reply. *Id.* to *plead*.

Lawyer and Plaintiff with Plaintiff.

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
August in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 643²

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

THE COURT OF APPEALS

1910, on 1

the year of

with

THE HON. NORMAN E. JONES.

PARLOW

STATE

that afterwards,
the opinion of the Court is
in the words

The People of the State
of Illinois

Defendant in Error,

Error to the Circuit Court of

Vs.

Mc Henry County.

Jerry Stefek,

Plaintiff in Error.

238 I.A. 643

Jett, J.

Jerry Stefek, plaintiff in error was indicted by the Grand Jury of Mc Henry County, charged with transporting intoxicating liquor. He was arrested and gave bond to appear at the next term of the Circuit Court of said county. The case was set for trial, jury was impaneled, the evidence heard, and the verdict of guilty returned against him and judgment entered thereon in his absence. He made a motion for a new trial and in arrest of judgment, both of which motions were overruled. Plaintiff in error sued out this writ of error. In the statement of the case on the part of the defendant in error, it was said:- "The Plaintiff in error never appeared after giving his bond, and when his case was reached on the trial call, he was still absent. The court ordered a plea of not guilty to be entered, impaneled a jury, heard the evidence, with the result that the jury found the plaintiff in error guilty, and the court entered judgment on the said verdict, and sentenced the plaintiff in error to pay a fine of \$400.00 and to be committed until fine and cost were paid." The question involved is whether or not a judgment of conviction can be sustained under such circumstances. Section 3 of Division 13 of the Criminal Code provides: "Upon the arraignment of a prisoner it shall be sufficient, without complying with any other form, to declare orally, by himself or his counsel, that he is not guilty; which plea shall be immediately entered upon the minutes of the court by the clerk, and the mention of the arraignment and such plea shall constitute the issue between the people of the State and the prisoner. And if the

238 I.A. 643

Defendant in Error,
vs.
Plaintiff in Error.

Jerry Stelek, plaintiff in error was indicted by the
jury of Mc Henry County, charged with transporting intoxic-
ant liquor. He was arrested and gave bond to appear at the
term of the Circuit Court of said county. The case was set
for trial, jury was impaneled, the evidence heard, and the ver-
dict of guilty returned against him and judgment entered thereon
to the effect that he made a motion for a new trial and in arrest
of judgment, both of which motions were overruled. Plaintiff in
error moved out this writ of error. In the statement of the case
part of the statement in error, it was said: "The plaintiff
never appeared after giving his bond, and when his case was
called on the trial call, he was still absent. The court ordered
him to be taken into custody, but he failed to appear, and the
court found that the jury found the plaintiff in error
guilty, and the court entered judgment on the said verdict, and con-
demned the plaintiff in error to pay a fine of \$400.00 and to be
imprisoned until fine and cost were paid." The question involved
was whether or not a judgment of conviction can be sustained under
the circumstances. Section 3 of Division 13 of the Criminal Code
reads: "When the arraignment of a prisoner it shall be sufficient,
in complying with any other form, to declare orally, by him-
self or his counsel, that he is not guilty; which plea shall be
entered on the minutes of the court by the clerk, and

clerk neglects to insert in the minutes of said arraignment and plea, it may and shall be done at any time by order of the court, and then the error or defect shall be cured." Section 5 of Division 13 of the Criminal Code reads as follows:- "In all cases where the party, on being arraigned, obstinately stands mute, the court shall order a plea of 'not guilty' to be entered on the minutes and the trial, judgment and execution shall proceed in the same manner as it would have done if the party had pleaded 'not guilty'."

The above and foregoing provisions of the statute were entirely ignored in the conduct of the trial of the plaintiff in error. There can be no doubt of the rule contended for by the plaintiff in error, and while we think it unnecessary to cite cases bearing upon the question presented for decision, yet in view of the position assumed by the defendant in error, we will do so.

In *Pepple against Summers, et al.* 227 Ill. App. 456, a conviction was had for keeping a common gaming house. A penalty was imposed by way of a fine and an order of commitment entered from which judgment, a writ of error was sued out, and the principal ground urged for a reversal was that neither of the accused was arraigned and entered pleas prior to the trial of said cause. In passing upon the question the court, at page 457 said :- "We have examined the record in said cause, and we find that this assignment of error is well taken, and that neither of said plaintiffs in error was arraigned or entered pleas in said cause. The statute in reference thereto provides: 'Upon the arraignment of a prisoner, it shall be sufficient, without complying with any other form, to declare orally, by himself or his counsel, that he is not guilty; which plea shall be immediately entered upon the minutes of the court by the clerk, and the mention of the arraignment and such plea shall constitute the issue between the people of the State and the prisoner.'"

This statute has been frequently passed upon by the Supreme and Appellate Courts of this State, and it has been unanimously held that unless a plea of not guilty is entered by the defendant in an indictment or information, there is nothing to try. *Johnson v.*

...it may and shall be done at any time by order of the court,
when the error or defect shall be cured." Section 5 of Division
of the Criminal Code reads as follows: "In all cases where the
...on being arraigned, obstinately stands mute, the court
...order a plea of 'not guilty' to be entered on the minutes
the trial, judgment and execution shall proceed in the same
...er as it would have done if the party had pleaded 'not guilty'.
The above and foregoing provisions of the statute were
...ly ignored in the conduct of the trial of the plaintiff in
...There can be no doubt of the rule contended for by the
...until in error, and while we think it unnecessary to cite cases
...upon the question presented for decision, yet in view of
position assumed by the defendant in error, we will do so.
In *People against Summers*, et al. 227 Ill. App. 486, a
...tion was had for keeping a common gaming house. A penalty was
...ed by way of a fine and an order of commitment entered from
... judgment, a writ of error was sued out, and the principal
...d argued for a reversal was that neither of the accused was
...nged and entered pleas prior to the trial of said cause. In
...ng upon the question the court, at page 487 said: "We have
...ined the record in said cause, and we find that this assignment
...error is well taken, and that neither of said plaintiffs in
...r was arraigned or entered pleas in said cause. The statute in
...tence thereto provides: 'Upon the arraignment of a prisoner, if
...be sufficient, without complying with any other form, to declare
...ly, by himself or his counsel, that he is not guilty; which plea
...be immediately entered upon the minutes of the court by the
...and the result of the arraignment and plea shall con-
...the same between the people of the State and the prisoner."
This statute has been frequently passed upon by the
...ellate Courts of this State, and it has been unanimously held

ple, 22 Ill. 314; Yundt V. People, 65 Ill. 372; Hoskins v. People, Ill. 87; Parkinson V. People, 135 Ill. 401; Persefield V. People, Ill. App. 488; People v. Ezell, 155 Ill. App. 299; People v. f, 211 Ill. App. 122.

In people vs. Kennedy, 203 Ill. 423, the court said:-
Under section 3 of division 13 of the Criminal Code a plea is essential to constitute an issue to be tried in a criminal case whether the offense charged is a misdemeanor or a felony, as the matter of a plea is not a mere formality; and the question of the matter of a plea is properly raised by general motion in arrest of judgment."

No plea was had by plaintiff in error in person, nor by counsel; he was not present in court and standing mute;- hence court could not legally order a plea of not guilty entered for

Under the facts and circumstances both the motion in arrest of judgment and for a new trial should have been granted. Judgment is a nullity, and the cause is reversed and remanded.

Reversed and remanded.

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."
People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

People v. Kennedy, 103 Ill. 482, the court said:—
"The error charged is a misdemeanor or a felony, as the
law is not a mere formality; and the question of the
guilt is a matter of fact, to be determined by the jury."

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
August in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

A JUST S. L. JOHNSON, Clerk of the Supreme Court,
and Real Estate

Whatsoever I have to set my hand in
Appellate Court in Ontario
the year of our Lord one thousand

65
(4)
abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 643³

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

held at Ottawa,
in the year of our
ty-five, which was
1905.

Hon. NORMAN

Hon. AUGUST

1905-1906

1905-1906

Musette Goff, administratrix of
the estate of Henry F. Goff, deceased,

appellant,

vs.

Appeal from the Circuit
Court of Knox County.

Chicago, Burlington & Quincy, Rail-
road Company, a corporation,

appellee.

238 I.A. 643

Jett, J.

Musette Goff, Administratrix of the estate of Henry F. Goff, deceased, appellant, brought suit against the Chicago, Burlington & Quincy Railroad Company, a corporation, appellee, to recover damages for the death of Henry F. Goff. This cause has been tried three times. Upon the first trial there was a judgment for \$25,000.00 which was reversed by this court. (231 Ill. App. 628). Upon the second trial there was a judgment for \$15,000.00 which was also reversed and was case No. 7336. In both of the former trials, the judgment was reversed upon the ground that the evidence did not sustain the charge of negligence as alleged in the declaration. Upon the third trial, it appears that the evidence was substantially the same as upon the two former trials. At the close of the evidence on behalf of the plaintiff, a motion was made by the defendant, appellee here, to instruct the jury to return a verdict in its favor. This motion was allowed and judgment entered accordingly and this appeal followed.

The trial court in sustaining the motion for a directed verdict, filed a written opinion which appears in the brief and argument of appellant. The action of the trial court on the third trial in directing a verdict for the defendant was based on the theory that the evidence on the trial was substantially the same as the evidence on the former trials and that in view of the decisions of the appellate court reversing the judgments entered on the first and second trials and remanding the cause, the only course that the trial court could pursue was to direct a verdict in favor of the defendant. Appellant

Administratrix of the estate of Henry T. Goff, deceased,

vs. Chicago & North Western Railway Company, a corporation,

Appellant from the Circuit Court of Knox County.

Appellant,

Chicago & North Western Railway Company, a corporation,

vs. Henry Railroad Company, a corporation,

Appellee.

238 I.A. 643

Wesette Goff, Administratrix of the estate of Henry T. Goff, deceased, appellant, brought suit against the Chicago, Burlington & Quincy Railroad Company, a corporation, appellee, to recover damages for the death of Henry T. Goff. This cause has been tried three times. Upon the first trial there was a judgment for \$25,000.00 which was reversed by this court. (231 Ill. App. 828). Upon the second trial there was a judgment for \$15,000.00 which was also reversed and was case No. 7326. In both of the former trials, the judgment was reversed upon the ground that the evidence did not sustain the charge of negligence as alleged in the declaration. Upon the third trial, it appears that the evidence was substantially the same as upon the two former trials. At the close of the evidence on behalf of the plaintiff, a motion was made by the defendant, appellee, to instruct the jury to return a verdict in its favor. This motion was allowed and judgment entered accordingly and this appeal allowed.

The trial court in sustaining the motion for a directed verdict, filed a written opinion which appears in the brief and argument of appellant. The action of the trial court on the third trial in sustaining a verdict for the defendant was based on the theory that the evidence on the trial was substantially the same as the evidence in the former trials and that in view of the decision of the appellate court reversing the judgments entered on the first and second trials in sustaining the cause, the only course that the trial court could

contends that the action of the trial court on the third trial in directing the jury to return a verdict in favor of the defendant, deprived the plaintiff of her constitutional right of trial by jury, and therefore, the trial court committed reversible error. In the former decisions of this court, we did not hold that there was no evidence fairly tending to support the allegations of the declaration. In *Mirich vs. Forschner Contracting Company*, 312 Ill. 343, the court held that in a case tried before a jury, a reversal of the judgment by the appellate court with a finding of fact was equivalent to taking the case from the jury; ~~the~~ and the court further held that in a case tried before a jury the appellate court could not reverse the judgment and make a finding of facts where the evidence tended to establish a cause of action; that in a case tried before a jury, the appellate court could only reverse the judgment and make a finding of facts where the evidence does not tend to prove a cause of action; that in a case tried before a jury, if the appellate court reversed the judgment and made a finding of facts where the evidence tended to prove a cause of action, such procedure by the appellate court would be a direct violation of the constitutional right of trial by jury.

In *Mirich vs. Forschner*, supra, the court further held in accordance with the long established rule, that in a case tried before a jury, the trial court could not take the case from the jury where the evidence tends to establish a cause of action; that in a case tried before a jury, if the trial court took the case from the jury where there was evidence tending to prove a cause of action, such procedure by the trial court would be a direct violation of the constitutional right of trial by jury.

When the appellate court reversed the judgments and remanded the cause for a new trial, the established procedure applicable to the third trial, was not changed in any way by the decisions of the appellate court. The trial court on the third hearing in respect to the procedure relating to the taking of the case from the jury, was governed by the well settled rule that the cause could not be taken

THE TRIAL COURT

that the action of the trial court on the third trial in directing the jury to return a verdict in favor of the defendant, deprived the plaintiff of her constitutional right of trial by jury, and therefore, the trial court committed reversible error. In the former decisions of this court, we did not hold that there was no evidence fairly tending to support the allegations of the declaration. In *Wilder vs. Forchman Contracting Company*, 213 Ill. 343, the court held that in a case tried before a jury, a reversal of the judgment by the appellate court with a finding of fact was equivalent to taking the case from the jury; and the court further held that in a case tried before a jury the appellate court could not reverse the judgment and make a finding of facts where the evidence tended to establish a cause of action; that in a case tried before a jury, the appellate court could only reverse the judgment and make a finding of facts where the evidence does not tend to prove a cause of action; that in a case tried before a jury, if the appellate court reversed the judgment and made a finding of facts where the evidence tended to prove a cause of action, such procedure by the appellate court would be a direct violation of the constitutional right of trial by jury. In *Wilder vs. Forchman*, supra, the court further held in accordance with the long established rule, that in a case tried before a jury, the trial court could not take the case from the jury where the evidence tends to establish a cause of action; that in a case tried before a jury, if the trial court took the case from the jury where there was evidence tending to prove a cause of action, such procedure by the trial court would be a direct violation of the constitutional right of trial by jury. When the appellate court reversed the judgment and remanded the case for a new trial, the established procedure applicable to the trial, was not changed in any way by the decisions of the appellate court. The trial court on the third hearing in respect to the procedure relating to the taking of the case from the jury, was

from the jury if the evidence tended to establish a cause of action; that it could only be taken from the jury if the evidence did not tend to prove the cause of action. The effect of the holding of the appellate court was that the preponderance of the evidence was against the verdict. It is clear that in view of the interpretation of the evidence by the appellate court in its decisions on the appeals from the judgments entered, at the former trials, the appellate court could not have taken the case from the jury by making a finding of facts. The trial court on the third trial took the case from the jury on the ground that the evidence was substantially the same as the evidence on the former trials. Now, since the evidence on the former trials would not have justified the appellate court in taking the case from the jury by making a finding of facts, it is obvious that the trial court in taking the case from the jury was exercising a power greater than that possessed by the appellate court. According to the rule announced in *Mirich vs. Forschner*, *supra*, the powers of the trial court and the appellate court in respect to the taking of a case from the jury are identical. It follows, therefore, that the action of the trial court in taking the case from the jury on the third trial was an erroneous exercise of power. It is urged on the part of the defendant that on the third trial, the court was bound by the two former decisions of the appellate court, reversing the judgment entered at the first and second trials and remanding the cause for a new trial. The trial court on the third trial was obliged to follow the decisions of the appellate court, but the appellate court did not suggest to the trial court to direct a verdict for the defendant, if the evidence on the third trial was the same, or substantially the same, as the evidence on the former trials. The appellate court merely remanded the cause to be tried again by the established rules of procedure.

In *Bournique vs. Drake*, decided by the appellate court of the First District, January 26, 1925, (No. 29292), it was held under circumstances similar to those presented here, that it was the duty

from the jury it was evidence tended to establish a case for the jury.
that it could only be taken from the jury if the evidence did not
and to prove the cause of action. The effect of the holding of the
appellate court was that the presentation of the evidence was
against the verdict. It is clear that in view of the interpretation
of the evidence by the appellate court in its decision on the
appeals from the judgments entered at the former trials, the
appellate court could not have taken the case from the jury by mak-
ing a finding of facts. The trial court on the first trial took
the case from the jury on the ground that the evidence was insuffi-
cient to show an injury to the former trial. Now, since
the evidence on the former trial would not have justified the
appellate court in taking the case from the jury by making a finding
of facts, it is obvious that the trial court in taking the case from
the jury was exercising a power greater than that possessed by the
appellate court. According to the rule announced in *Winters v.*
Wormsley, supra, the powers of the trial court and the appellate
court in respect to the taking of a case from the jury are identical.
It follows, therefore, that the action of the trial court in taking
the case from the jury on the third trial was an erroneous exercise
of power. It is urged on the part of the defendant that on the
first trial, the court was bound by the two former decisions of the
appellate court, reversing the judgment entered at the first and
second trials and remanding the cause for a new trial. The trial
court on the third trial was obliged to follow the decisions of the
appellate court, but the appellate court did not suggest to the trial
court to direct a verdict for the defendant, if the evidence on the
third trial was the same, or substantially the same, as the evidence
on the former trials. The appellate court merely remanded the cause
to be tried again by the established rules of procedure.
In *Winters v. Drake*, decided by the appellate court of the
third district, January 26, 1926, (No. 23291), it was held under

of the trial court to submit to the jury the question as to whether or not the evidence was sufficient to sustain the verdict. The question now arises as to what the trial court should do after a case has been submitted to a jury on two occasions and the appellate court has held that the evidence was not sufficient to sustain the judgment.

Whether or not the evidence in a case is sufficient to support a verdict in favor of the plaintiff is a question solely for the courts, and is never one which a jury is permitted to determine. This court on two occasions has held that the evidence in the case at bar is not sufficient to support a verdict for the plaintiff and we are confident of the correctness of that holding. If the evidence on the third trial was substantially the same as it was in the two former trials, it would have been the duty of the trial court to set a verdict aside, had one been returned in favor of the plaintiff. We realize that such action would not finally dispose of the case, but it is fair to assume that the plaintiff has produced in the three trials, all of the obtainable evidence in her behalf. The procedure pointed out by us will not necessarily conclude such cases, but as long as it is the only method now allowed by law, it must be followed.

The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
August in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

6

J. HUTCHESON

in the year
1881
E. H. H.

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 643⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 20 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

NORMAN

AUGUST

Frank Meyers,

appellant,

vs.

Delima Brouillette and the
Kankakee Building and Loan
Association, a corporation,
mortgagee,

appellees,

Appeal from the Circuit Court
of Kankakee County.

238 I.A. 643

Jett, J.

Frank Meyers, appellant, filed his bill in the circuit court of Kankakee county to foreclose a mechanic's lien against the property of Delima Brouillette, appellee. The evidence was heard by the chancellor and he, at the suggestion and with the consent of the parties in interest, inspected the premises. The solicitors and parties to the suit accompanied the court at the time of the inspection and examination of the building. After the hearing of the testimony and the inspection of the building the cause was argued. The bill for a lien was dismissed for want of equity, and this appeal followed.

It appears that appellee was the owner of a certain dwelling house and premises in the City of Kankakee, and that in the month of March, 1923, she entered into an oral contract with the appellant to raise the roof of the house so as to make it a two story building; to sheet the outside of that part that was to be raised; to lathe the outside of the whole house; to take off beaver board on the inside; put on lathe and plaster; to build a bathroom and to stucco the building. A wash room was to be built on the southeast corner of the house 7 x 14 feet with an 8 foot ~~ceiling~~ ceiling and to be shingled. The main part of the house was to be raised on west and north. House to be shingled with asphalt shingles. A two foot extension was to be constructed on the northeast corner of the house and on the east side of the main part and north of the

Frank Meyers,

Appellant,

Appeal from the Circuit Court

of Kansas County.

vs.

Delima Brouillette and the

Kansas Building and Loan

Association, a corporation,

appellees.

appellees.

238 I.A. 643

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property of Delima Brouillette, appellee. The evidence was heard

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this appeal followed.

It appears that appellee was the owner of a certain dwelling

house and premises in the City of Kansas, and that in the month of

March, 1923, she entered into an oral contract with the appellant to

raise the roof of the house so as to make it a two story building;

to sheet the outside of that part that was to be raised; to raise

the outside of the whole house; to take off plaster heavy on the

inside; put on lath and plaster; to build a bathroom and to attach

the building. A small room was to be built on the westward corner

of the house 5 x 16 feet with an 8 foot window ceiling and to be

shingled. The main part of the house was to be raised on walls

and north. House to be shingled with asphalt shingles. A two foot

extension was to be constructed on the westward corner of the

kitchen so as not to obstruct the window. Other items were included in the contract, the above constitutes the most important ones. The contract price which appellee was to pay appellant for furnishing the materials and performing the services on the premises in question was \$1850.00, later changed to \$1875.00 when an additional contract was entered into by which appellee was to pay appellant \$25.00 to remove a chimney.

It appears that appellant began the work and did substantially all of it during which time he received \$375.00. Appellee refused to pay anything further upon the ground that the workmanship and material were not according to the terms of the contract. Much testimony was heard by the chancellor. A large number of witnesses were examined with reference to the condition of the building after the work was performed, and the character of the material used. The testimony discloses that it was an old building which had stood for about forty years and that some of the material used in making the repairs was old.

Appellee claims that after she saw the kind of work appellant was doing she refused to permit him to build the garage which had been agreed upon in the original contract. She contends that the roof leaks; that the floors are not even; that the plaster is falling from the walls; that the coat upon the house is cracking and the stucco is uneven; that the windows cannot be raised or lowered; that there are many cracks in the building that make it very cold in winter. A number of other alleged defects are complained of by reason of which defects appellee insists that there has not been a substantial compliance with the contract. From an examination of the evidence it shows that the testimony is conflicting both with reference to the quality of material used and the character of work done.

Since the chancellor heard the testimony of the witnesses and inspected the building and thereafter dismissed the bill for a lien for want of equity, in this condition of the record what is the rule that controls this case?

...as not to obstruct the window. Other items were included in the contract, the above constitutes the most important ones. The

contract price with appellee was to pay appellant the balance of the materials and performing the services on the premises in question was \$1880.00. Later changed to \$1875.00 when an additional contract was entered into by which appellee was to pay appellant \$28.00 to

It appears that appellant began the work and did substantially all of it during which time he received \$375.00. Appellee refused to pay anything further upon the ground that the workmanship and

materials were not according to the terms of the contract. Much testimony was heard by the chancellor. A large number of witnesses were examined with reference to the condition of the building after the work was performed, and the character of the material used. The testimony discloses that it was an old building which had stood for about thirty years and that some of the material used in making the repairs was old.

Appellee claims that after she saw the kind of work appellant was doing she refused to permit him to build the garage which had been agreed upon in the original contract. She contends that the roof leaks; that the floors are not even; that the plaster is falling from the walls; that the roof upon the house is leaking; that the windows cannot be opened or closed; that there are many cracks in the building that make it very cold in winter. A number of other alleged defects are complained of by her of which defects appellee insists that there has not been a substantial compliance with the contract. From an examination of the evidence it shows that the testimony is conflicting both with reference to the quality of material used and the character of work done. The chancellor heard the testimony of the witnesses and

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...

The case of Philip Carey Manufacturing Company v. Weygant, 143 Ill. App. 297, was a proceeding to enforce a mechanic's lien, and at pages 298-299 the court, among other things said:- "This case turns solely upon questions of fact as to the quality of the roofing material used and the manner in which it was put on or "applied", the ultimate question of fact being, was there a substantial compliance with the contract on the part of appellee. The evidence was produced in open court, the chancellor saw and heard the witnesses; in such case his findings and conclusions upon questions of fact based upon the statements of such witnesses should be accepted by this court, unless they clearly impress us as being palpably erroneous."

Ruddy vs. McDonald, 244 Ill. 494, was a suit to foreclose a mechanic's lien and at page 497, the court said:- "Where the evidence is conflicting and the chancellor has confirmed the findings of the master, this court will not disturb the decree unless it is clearly and manifestly against the weight of the evidence."

In Delaney vs. Delaney, et al, 175 Ill. 187, the court said:- "The chancellor's findings of fact on conflicting oral testimony will not be disturbed on appeal unless clearly and manifestly against the preponderance of the evidence."

What the court said in Greenwood v. Penn, 136 Ill. 146, is applicable in this case, viz: "The testimony of the complainant and of defendant Penn as well as that of most of the other witnesses, was given orally in court, and the court having thus had an opportunity to see and hear the witnesses was in a much better position to judge of their relative credibility than we can be, with only the record of their testimony before us."

In Village of Itasca v. Schroeder, 182 Ill. 192, at page 212, the court said:- "The finding of the chancellor on conflicting evidence stands substantially on the same ground as the verdict of a jury. The error in finding as to facts must be clear and palpable to authorize a reversal."

If the view of the premises is made at the request or with

The case of Philip Carey Manufacturing Company v. Weygant, 143 Ill. App. 237, was a proceeding to enforce a mechanic's lien, and at pages 238-239 the court, among other things said: - "This case turns solely upon questions of fact as to the quality of the testing material used and the manner in which it was put on or 'applied', the ultimate question of fact being, was there a substantial compliance with the contract on the part of appellee. The evidence was produced in open court, the chancellor saw and heard the witnesses; in such case his findings and conclusions upon questions of fact based upon the statements of such witnesses should be accepted by this court, unless they clearly impress us as being palpably erroneous." In Ruddy vs. McDonald, 244 Ill. 494, was a suit to foreclose a mechanic's lien and at page 497, the court said: - "Where the evidence is conflicting and the chancellor has confirmed the findings of the court, this court will not disturb the decree unless it is clearly and manifestly against the weight of the evidence." In Delaney vs. Delaney, at 11, 175 Ill. 187, the court said: - "The chancellor's findings of fact on conflicting oral testimony will not be disturbed on appeal unless clearly and manifestly against the preponderance of the evidence." In that case the court said in Greenwood v. Penn, 136 Ill. 146, is applicable in this case, viz: "The testimony of the complainant and of defendant Penn as well as that of most of the other witnesses, was given orally in court, and the court having thus had an opportunity to see and hear the witnesses was in a much better position to judge of their relative credibility than we can be, with only the record of their testimony before us." In Village of Itasca v. Schroeder, 132 Ill. 192, at page 212, the court said: - "The finding of the chancellor on conflicting testimony stands substantially on the same ground as the verdict of a jury. The error in finding as to facts must be clear and palpable."

the consent of the parties, it has been held to be proper. Thus in an action to quiet title, where the judge before whom the case was tried without a jury viewed the premises at the request of the parties, the Appellate Court held that the trial judge was entitled to treat the knowledge gained by the view as independent evidence and to make his findings accordingly. *Hatton v. Gregg*, 4 Cal.^{app.} 537; 88 Pac. 592.

And where the parties to an action involving a dispute concerning a mining claim submitted their controversy to the trial judge without a jury, and after the evidence was in it was agreed by the parties that the judge should make a personal inspection of certain parts of the property, it was held that the findings of the trial judge were conclusive even though the condition of the place had been changed before the inspection, which fact was known to the party consenting to the view. *Brown vs. Colorado Development Company* ~~47~~ Colo. 294; 107 Pac. 258.

We are unable to say on what ground the chancellor dismissed the bill. We do not know what the chancellor saw or the evidence upon which he based the decree. We do know after an examination of the record that the testimony is conflicting on the question as to whether or not there has been a substantial compliance with the terms of the contract.

If the trial court found that the terms of the contract had not been substantially complied with it was its duty to dismiss the bill. *Bostrum vs. Becker*, 172 Ill. App. 410-413.

Although the chancellor viewed the building at the suggestion and with the consent of the parties in interest, after he had heard the testimony of the various witnesses, we are not prepared to adopt the rule as announced in the ~~Sabin~~ Colorado case above cited. We do hold, however, that under a state of facts as are disclosed in this record, including an inspection of the premises, that unless the decision of the chancellor is at variance with the uncontradicted evidence the reviewing court should not disturb it. We also hold that the conclusion reached by the trial judge is not at variance

the consent of the parties, it has been held to be proper. Thus
in the case of *Wright v. Wright*, where the judge before whom the case
was tried without a jury viewed the premises at the request of the
parties, the appellate court held that the trial judge was entitled
to treat the knowledge gained by the view as independent evidence
and to make his findings accordingly. *Hutton v. Gregg*, 4 Cal. 387;
32 Cal. 592.

And where the parties to an action involving a dispute con-
cerning a mining claim admitted their controversy to the trial
judge without a jury, and after the evidence was in it was agreed
by the parties that the judge should make a personal inspection
of certain parts of the property, it was held that the findings
of the trial judge were conclusive even though the condition of
the place had been changed before the inspection, which fact was
known to the party consenting to the view. *Brown vs. Colorado
Development Company*, 107 Cal. 121; 107 Cal. 121.
It is well to say on what ground the chancellor dismissed
the bill. He found that the testimony was in conflict
and which he found the better. He found that the testimony
of the record that the testimony is conflicting on the question
as to whether or not there has been a substantial compliance with
the terms of the contract.

It is the duty of the court to find the facts of the case and
not to be substantially complied with it was its duty to find the
facts. *Wright v. Wright*, 107 Cal. 121; 107 Cal. 121.
Although the chancellor viewed the building at the suggestion
and with the consent of the parties in interest, after he had heard
the testimony of the various witnesses, we are not prepared to adopt
his findings as announced in the case above cited. We do
hold, however, that where a state of facts as are disclosed in this
case, involving an inspection of the premises, that unless the
findings of the chancellor be substantially complied with the facts of the case.

with the uncontradicted evidence in the case.

In view of the law that arises out of the facts in this case, we conclude that the decree of the circuit court of Kankakee county should be affirmed.

Decree affirmed.

with the uncorroborated evidence in this case.

In view of the fact that there was no other evidence in this case, the court should be allowed to find the facts of the circuit court of Kansas county should be allowed.

Twice allowed.

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STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
August in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk of the Appellate Court,
State of Illinois, and keeper of the Records and Seal thereof,
true copy of the opinion of the said Appellate Court in
this case.
Witness my hand and seal this 22nd day of
May, 1888.

Abstract only

7500

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 643⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 24 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

Rehearing Denied Sept 26, 1925

AT THE END OF THE APPELLATE

of your

within and

H. H.

JOHN D. JOHNSON,

E. J. WELTER, Sheriff

that afterward

the opinion of the

The La Salle County Electric
Company, a corporation,

appellant,

vs.

Appeal from the Circuit Court
of Putnam County.

George McLean and Mrs. George
McLean, alias Alice McLean,
appellees,

238 I.A. 643

Jett, J.

The La Salle County Electric Company, a corporation, appellant, obtained a written permit from a number of farmers to set poles, construct and maintain an electric line upon, along and adjacent to certain public highways running through the lands of the farm owners respectively. The right acquired under this instrument included the right to go upon the lands and to cut and trim all trees in the vicinity of said line when constructed. The written permit relied upon by appellant does not contemplate the extension of the line and the maintenance of poles through the lands of any of the owners except along and adjacent to the highways.

Among the owners of land who joined in giving the permit was the appellee, George McLean. It appears that the appellant was desirous of furnishing power for a plant owned and operated by H.D. Conkey and Company; that it obtained oral permission of appellee, George McLean, to construct a transmission line across his premises to the plant of said Company.

Subsequent to the granting of the oral permission by McLean, poles were set and wires strung over his land to the said plant which was operated during the season of 1923, with power conveyed over the transmission line constructed across the McLean property. Subsequent thereto McLean and Conkey had a disagreement and it appears that McLean felled a tree over the power line and interrupted and disturbed the service. Thereupon appellant filed a bill for an injunction. A temporary writ was issued. A demurrer was filed

The La Salle County Electric

Company, a corporation,

appellant,

Appeal from the Circuit Court

of Putnam County.

George McLean and Mrs. George

McLean, alias Alice McLean,

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238 I.A. 643

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of the owners except along and adjacent to the highways.

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the appellee, George McLean. It appears that the appellant was

desires of furnishing power for a plant owned and operated by H.D.

Company and Company; that it obtained oral permission of appellee,

George McLean, to construct a transmission line across his premises

to the land of said company.

According to the practice of the said permission by appellee,

poles were set and wires strung over the land to the said plant

which was operated during the season of 1928, with power conveyed

over the transmission line constructed across the McLean property.

Subsequent thereto McLean and Company had a disagreement and it

appears that McLean failed a tree over the power line and destroyed

and disturbed the service. Thereupon appellant filed a bill for

to the bill and appellant filed an amended bill and asked for a modification of the original injunction or for the granting of a new writ. A demurrer was filed to the amended bill and also a motion to dissolve the injunction. On Hearing the court dissolved the injunction, dismissed the bill for want of equity and assessed damages against the appellant and this appeal followed.

Appellant filed its abstracts and briefs and in addition thereto, has made a motion to transfer the cause to the Supreme Court upon the ground that a freehold is involved.

There is no dispute in this case as to the right of appellant to maintain its poles and wires along the public highway. It is the contention, however, of appellees that the appellant has no right to maintain its poles and operate its transmission line across their farm, when said poles and wires are not adjacent to or along any public highway.

Appellant insists that as oral consent was given for the construction of the said transmission line across the farm not adjacent to the public highway, appellees are estopped to interfere with the same.

The primary object of the original and amended bill was to enjoin appellees from interfering with the wires and poles across their land.

Under the facts as disclosed, we are of the opinion that no freehold is involved. An easement or other incorporeal hereditament in lands cannot be created by parol but only by grant or by prescription which presumes a grant, and at law a ~~parol~~ parol license is revocable though a consideration has been paid or expenditures have been made on the faith of the agreement. Girard et al, vs. The Lehigh Stone Company, 280 Ill. 479.

The oral permit given to set poles and string wires over and across the lands in question was a mere license and did not create any freehold estate. Morse vs. Lorenz, et al, 262 Ill. 115.

The motion to transfer the cause to the Supreme Court is denied.

the bill and appellant filed an amended bill and asked for a modification of the original injunction or for the granting of a new writ. A demurrer was filed to the amended bill and also a motion to dissolve the injunction. On hearing the court dissolved the injunction, dismissed the bill for want of equity and assessed damages against the appellant and this appeal followed.

Appellant filed the abstracts and bills and in addition there was made a motion to transfer the cause to the Supreme Court upon the ground that a freehold is involved.

There is no dispute in this case as to the right of appellant to maintain its poles and wires along the public highway. It is the contention, however, of appellees that the appellant has no right to maintain its poles and operate its transmission line across their farm, when said poles and wires are not adjacent to or along any public highway.

Appellant insists that an oral consent was given for the construction of the said transmission line across the farm not adjacent to the public highway, appellees are estopped to interfere with the same.

The primary object of the original and amended bill was to restrain appellees from interfering with the wires and poles across their land.

Under the facts as stated, we are of the opinion that no useful is involved. An attempt to bring this case before the court is not to be sustained by law but only by force of equity.

It is not to be denied that a consideration has been paid or consideration has been made on the faith of the agreement. Given et al. vs. The South States Company, 200 Ill. 492.

The oral permit given to set poles and string wires over and across the land in question was a mere license and did not create any vested right. Morse vs. Morse, et al, 202 Ill. 115.

In view of the fact that we have held that the oral permit was but a license, it necessarily follows, that there is no equity in the bill.

The action of the chancellor dissolving the injunction, dismissing the bill and in assessing damages will be affirmed.

Decree affirmed.

In view of the fact we have held that the oral permit issued by the coroner will not bind the jury, it necessarily follows, that there is no evidence in the case to support the verdict.

The Bill.

The action of the committee dissolving the institution, maintaining the bill and in assessing damages will be determined.

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five

Justus Johnson
Clerk of the Appellate Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of
the said Appellate Court in the opinion of the said Appellate Court in

the said case, this _____ day of _____, 19____.

Abstract only

7470

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 644¹

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 22 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

Rehearing Denied Sept. 26, 1925.

WRITE

2-10-1918

RECEIVED
JAN 10 1918
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

Fred W. Sneed and Burt Sneed,
partners, doing business under
the firm name of Sneed Brothers,
appellants,

Appeal from the City Court
of Sterling.

vs.

Leonard Kroff,
appellee,

238 I.A. 644

Jett, J.

In March, 1923, Leonard Kroff, appellee, purchased of Fred W. Sneed and Burt Sneed, partners doing business as Sneed Brothers, appellants, a Durant sedan automobile executing and delivering to them in payment thereof three notes, one for \$967.00, another for \$400.00 and the third for \$200.00 and secured the payment thereof by a chattel mortgage upon the ~~xxxx~~ car. Appellee received the automobile and subsequently paid appellants the amount due upon the \$967.00 and the \$400.00 notes. The \$200.00 note, not having been paid, judgment by confession was taken thereon which, upon motion, was opened up, pleas were filed, and a trial by jury resulted in a verdict against appellants and in favor of appellee for \$1367.00, being the aggregate of the principal sum he had theretofore paid appellants in discharging the \$967.00 and the \$400.00 notes. A motion for a new trial having been denied, judgment was rendered upon the verdict and the case comes to this court by appeal.

It is the contention of appellee that he purchased a 1923 model car, while as a matter of fact the car which he received was a 1922 model; that he did not become aware of the fact that the car was not a 1923 model until he sought to renew his insurance thereon in March, 1924; that he thereupon took it up with appellants and after becoming convinced that it was not the model car he purchased he gave notice to them that he had rescinded the sale, and, his offer to return the car being declined, he left it at another garage subject to their

Tred W. Sneed and Burt Sneed,

partners, doing business under

the firm name of Sneed Brothers,

appellants,

Appeal from the City Court

of Sterling,

vs.

Leonard Kroff,

appellee,

238 I.A. 644

1931.

In March, 1928, Leonard Kroff, appellee, purchased of Tred

W. Sneed and Burt Sneed, partners doing business as Sneed Brothers,

appellants, a Durant sedan automobile executing and delivering to

them in payment thereof three notes, one for \$967.00, another for

\$400.00 and the third for \$200.00 and secured the payment thereof by

a chattel mortgage upon the same car. Appellee received the automo-

bile and subsequently paid appellee the amount due upon the \$967.00

and the \$400.00 notes. The \$200.00 note, not having been paid, judg-

ment by confession was taken thereon which, upon motion, was granted.

Two pleas were filed, and a trial by jury resulted in a verdict against

appellants and in favor of appellee for \$1967.00, being the aggregate

of the principal and he had thereupon paid appellee in discharge-

ment the \$967.00 and the \$400.00 notes. A motion for a new trial hav-

ing been denied, judgment was rendered upon the verdict and the case

comes to this court by appeal.

It is the contention of appellee that he purchased a 1928 model

car, while as a matter of fact the car which he received was a 1927

model; that he did not become aware of the fact that the car was not

a 1928 model until he sought to renew his insurance thereon in March,

1929; that he thereupon took it up with appellants and after becoming

convinced that it was not the model car he purchased he gave notice

to them that he had rescinded the sale, and, his offer to return the

order and demanded the return of the money he had paid and the satisfaction of the judgment which appellants had taken against him upon the \$200.00 note.

While conceding that this car was a 1922 model, appellants insist that inasmuch as it was in their show room subject to inspection and was in fact examined by appellee prior to the time he purchased it he (appellee) should have known that it was not a 1923 model. Appellant Burt Sneed testified that he did not know it was a 1922 model until so advised by the company on June 12, 1924, but inasmuch as it was purchased by appellants from the factory after the 1923 models were supposed to be out, he took it for granted that it was a ~~1922~~ 1923 model but at the time of the sale there was no discussion between appellee and this appellant with reference to its model. Appellant Fred Sneed, testified to substantially the same.

Appellee testified that one of the appellants, at the time he purchased the car, assured him, in response to his inquiry, that the car was a 1923 model and in this he was corroborated by the testimony of George Engle who detailed a conversation with appellant, Burt Sneed, shortly after the sale in which Sneed stated he had sold appellee the car as a 1923 model and that he (Sneed) did not know what appellee would do when he found out it was a 1922 car. Other facts and circumstances in evidence tend to corroborate appellee and in the absence of any error of the trial court in the reception of the evidence or in giving to the jury the instructions covering the law applicable to the case, we do not feel justified in reversing this judgment.

v Furthermore if it was impossible for either of appellants, who were retail automobile dealers of this and other cars, to ascertain whether this particular car was a 1922 or a 1923 model, we are unable to understand how they are now in a position to insist that from his casual inspection before the sale appellee should have been able to have determined what model it was.

Rule 16 of this court requires that the abstract shall contain an abridgement of the record, must set out in full all instructions

order and demanded the return of the money he had paid for the car. The court of the highest which appellant has taken against the order was \$100.00 more or less.

While examining that this car was a 1933 model, appellant in-
tended that it was not a 1933 model, but it was in fact examined by appellant prior to the time he purchased it as (appellant) should have known that it was not a 1933 model.

Appellant Fred Sneed testified that he did not know it was a 1933 model until he advised by the company on June 12, 1934, but in fact it was purchased by appellant from the factory after the 1933 models were supposed to be out, he took it for granted that it was a 1933 model but at the time of the sale there was no discussion between appellant and this appellant with reference to its model.

Appellant Fred Sneed, testified to substantially the same.

Appellant testified that one of the appellants, at the time he purchased the car, answered him, in response to his inquiry, that the car was a 1933 model and in this he was corroborated by the testimony of Sneed, who detailed a conversation with appellant, Sneed, shortly after the sale in which Sneed stated he had sold appellant the car as a 1933 model and that he (Sneed) did not know that appellant would do when he found out it was a 1933 car. Other facts and circumstances in evidence tend to corroborate appellant and the absence of any error of the trial court in the reception of the testimony or in giving to the jury the instructions covering the law applicable to the case, we do not feel justified in reversing this verdict.

It is the contention of appellant that it was impossible for either of appellants, who are retail automobile dealers of this and other cars, to ascertain that this particular car was a 1933 or a 1934 model, we are unable to say how they are now in a position to insist that from his examination before the sale appellant should have been able to determine what model it was.

This is at this court requires that the abstract shall contain

given, modified or refused and must preserve or present every exception relied upon and every error alleged. The abstract indicates that there was a verdict for the defendant and a motion for a new trial and a motion in arrest of judgment and that there was judgment on the verdict for \$1367.00 in favor of the defendant and against the plaintiffs, but does not show that any exception was taken to the entry of this judgment. The abstract, after setting forth an abridgement of the evidence states that "thereupon the plaintiff asked the court to instruct the jury as follows," then follows four instructions. The abstract then states that "thereupon defendant asked the court to give the following instructions" and two instructions appear. Whether these instructions or any of them were given, modified or refused does not appear nor does it appear that any exception was taken to any action which the court might have taken with reference to the giving, refusal or modification of instructions.

Appellants are, therefore, in no position to urge upon the attention of this court their several assignments of error, not herein disposed of, and in this state of the record there is nothing we can do but affirm the judgment of the City Court of Sterling.

Judgment affirmed.

...entitled to relief and was given or placed every opportunity
...and every other alleged. The abstract indicates
...and a verdict for the defendant and a motion for a new
...and a motion in arrest of judgment and that there was judgment
...the verdict for \$150.00 in favor of the defendant and against
...the plaintiff, but does not show that any exception was taken to
...of this judgment. The abstract, after setting forth an
...of the evidence states that "thereupon the plaintiff
...the court to instruct the jury as follows," then follows four
...instructions. The abstract then states that "thereupon defendant
...the court to give the following instructions" and two in-
...instructions. Whether these instructions or any of them were
...entitled to be given and whether any error was shown by reason that
...exception was taken to any action which the court might have
...with reference to the giving, refusal or modification of
...instructions. It is noted that the court in its instructions
...instructions are, therefore, in no position to give upon the
...of this court their several assignments of error, nor
...of the record of the record there is nothing
...to put within the judgment of the city court or circuit.

Respectfully submitted,

Very truly yours,
J. C. [Signature]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for
said Second District of the State of Illinois and keeper of the Records and Seal thereof, DO HEREBY
CERTIFY that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this 28th
day of Sept. in the year of our Lord one
thousand nine hundred and twenty nine

Justus L. Johnson
Clerk of the Appellate Court.

Whereupon, I hereto set my hand and affix the

8 Court, at Ottawa, this

at of our Lord one

a
①
abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 644²

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 22 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

ANSWER: YES

YES

YES

YES

YES

Harry Zelden,

appellee,

vs.

North British and Mercantile

Insurance Co.,

appellant,

Appeal from the Circuit Court
of Woodford County.

238 I.A. 644

Partlow, J.

Appellee, Harry Zelden, began suit in the circuit court of Woodford county against appellant, North British and Mercantile Insurance Company, a corporation, upon a policy of fire insurance of \$600, on a dwelling house which was entirely destroyed by fire. A jury was waived, and upon a trial by the court, judgment was rendered against appellant for the full amount of the policy, and this appeal was prosecuted.

The facts and the pleadings in this case are identical with the case of Zelden vs. Commercial Union Assurance Company decided by this court at this term. The only difference in the cases is that they are against different defendants. This judgment will have to be reversed and the cause remanded for the reasons stated in the other case.

Reversed and remanded.

Harry Nelson,

appellee,

vs.

North British and Mercantile

Insurance Co.,

appellant.

Plaintiff, v.

Appellee, Harry Nelson, began suit in the circuit court of

Scotts county against appellant, North British and Mercantile

Insurance Company, a corporation, upon a policy of life insurance

of \$500, on a dwelling house which was entirely destroyed by fire.

A jury was sworn, and upon a trial by the court, judgment was

rendered against appellant for the full amount of the policy, and

this appeal was prosecuted.

The facts and the pleadings in this case are identical with

the case of Nelson vs. Commercial Union Assurance Company decided

by this court at this term. The only difference in the cases is

that they are against different defendants. This judgment will

be reversed and the cause remanded for the reasons stated

in the other case.

Reversed and remanded.

Appeal from the Circuit Court

of Woodford County.

333 I.A. 644

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for
said Second District of the State of Illinois and keeper of the Records and Seal thereof, DO HEREBY
CERTIFY that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this 25th
day of Aug in the year of our Lord one
thousand nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

J. Justice J. Johnson, Clerk of the Appellate Court in and for

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 644³

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 22 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

ERM

NORMAN

AUGUSTUS

THOMAS

END

17

Harry Zelden,

appellee,

vs.

Appeal from the Circuit Court
of Woodford County.

Commercial Union Assurance

Company, a corporation,

appellant,

· 238 I.A. 644

Partlow, J.

Appellee, Harry Zelden, began suit in the circuit court of Woodford county against appellant, Commercial Union Assurance Company, a corporation, upon a policy of fire insurance of \$400.00 on a dwelling house and \$700.00 on furniture, the building and contents being entirely destroyed by fire. A jury was waived, and upon a trial by the court, judgment was rendered against appellant for \$1100.00 and this appeal was prosecuted.

The fire was on May 11, 1921. A declaration was filed on March 25, 1922, setting up the policy in haec verba, alleging the fire and the total loss, and "that plaintiff forthwith after the happening of the loss and damage, to-wit, on _____, he there gave notice thereof to the defendant, and as soon thereafter as possible, to-wit, on _____ there delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit; which said account was signed by the plaintiff and accompanied by his oath that the same was in all respects just and true, and showing the value of said property, and in what general manner the said building was occupied at the time of the happening of said loss and damage, and the name of the person then in the actual possession thereof, and when and how the said fire originated, so far as the plaintiff knew or believed, and his interest in the said property at that time; to which said account was annexed, and therewith delivered, a certificate under the hand and seal of the notary public nearest to the place of said fire. * * * Nevertheless, although the plaintiff has kept and performed all things in the said policy mentioned on his part to be kept and performed, the defendant had not yet paid to the plaintiff the

Appeal from the Circuit Court
of Woodford County.

Commercial Union Assurance
Company, a corporation,
appellant,

238 I.A. 644

Appellee, Harry Seiden, began suit in the circuit court of
Woodford county against appellant, Commercial Union Assurance Company,
corporation, upon a policy of fire insurance of \$400.00 on a dwelling
house and \$700.00 on furniture, the building and contents being
entirely destroyed by fire. A jury was sworn, and upon a trial by
the court, judgment was rendered against appellant for \$1100.00 and
the appeal was prosecuted.

The fire was on May 11, 1921. A declaration was filed on March
2, 1922, setting up the policy in these words, alleging the fire and
the total loss, and "that plaintiff forthwith after the happening
of the loss and damage, to-wit, on _____, he there gave notice
in writing to the defendant, and as soon thereafter as possible, to-wit,
_____ there delivered to the defendant as particular an account
of the said loss and damage as the nature of the case would admit;
and said account was signed by the plaintiff and accompanied by his
affidavit that the same was in all respects true and true, and showing the
value of said property, and in what general manner the said building
was occupied at the time of the happening of said loss and damage, and
the name of the person then in the actual possession thereof, and upon
and how the said fire originated, as far as the plaintiff knew or
believed, and his interest in the said property at that time, to which
said account was annexed, and lawfully delivered, a certified copy
of the hand and seal of the notary public nearest to the place of said
the _____, although the plaintiff has not yet

2
said amount of the loss and damage aforesaid."

To this declaration a demurrer was sustained for the reason that it failed to show when notice of loss was given, or that proof of loss was made within sixty days, as provided in the policy. On July 27, 1923, an amended declaration of two counts was filed. A demurrer was sustained to the first count and the second count was withdrawn. On December 10, 1923, two additional counts were filed. Each of the counts of the amended declaration, and each of the two additional counts, set out the policy in haec verba, and each count contained the same allegation as to the fire, the total loss of property, and the insurable interests of the appellee. The first additional count also alleged that notice of the loss was given on the day after the fire, in writing, to appellant; thereafter appellant sent an adjuster to adjust the damages, and the adjuster agreed to adjust the loss; that said adjuster made an investigation of the time and origin of the fire, the interest of the appellee, and of all others in the property destroyed; the cash value of the same, the amount of the loss, the encumbrance thereon, and ~~af~~ all other insurance on the property; made a thorough and complete investigation of all the facts with reference to the property; and alleged that in and by these actions of its adjuster, appellant waived, within sixty days after the fire, proof of loss as provided in the policy. The second additional count, of December 10, 1923, alleged that on the day after the fire notice of the fire was given to appellant in writing; that within sixty days after the fire a statement signed and sworn to by appellee was rendered to appellant setting out in detail all of the requirements in regard to proof of loss as provided in the policy, and that appellant kept such proof of loss for more than sixty days without making any objection thereto, and then and there waived any defects or irregularities in said proofs.

Th the additional counts appellant filed a plea of the general issue and three special pleas. Appellee filed a similiter to the plea of the general issue and a demurrer to each of the three special pleas which demurrers were sustained. Appellant then filed three

Small amount of the loss was covered by insurance.

To this declaration a demurrer was sustained for the reasons that it failed to show that notice of loss was given, as required by law.

It was made within sixty days, as provided in the policy. On July 27, 1923, an amended declaration of two counts was filed. A demurrer was sustained to the first count and the second count was withdrawn. On

December 10, 1923, two additional counts were filed. Each of the counts of the amended declaration, and each of the two additional

counts, set out the policy in these words, and each count contained the same allegation as to the fire, the total loss of property, and the irreparable interests of the appellee. The first additional count

also alleged that notice of the loss was given on the day after the fire, in writing, to appellant; thereafter appellant sent an adjuster to adjust the damage, and the adjuster agreed to adjust the loss;

and said adjuster made an investigation of the time and origin of the fire, the interests of the appellee, and of all others in the property; testified that the cash value of the same, the amount of the

loss, the circumstances thereon, and of all other insurance on the property; made a thorough and complete investigation of all the facts with reference to the property and alleged that in and by

these actions of its adjuster, appellant waived, within sixty days after the fire, proof of loss as provided in the policy. The second

additional count, of December 10, 1923, alleged that on the day after the fire notice of the fire was given to appellant in writing; that within sixty days after the fire a statement signed and sworn to

by appellee was rendered to appellant setting out in detail all of the facts in regard to proof of loss as provided in the policy; and that appellant kept such proof of loss for more than sixty days

without making any objection thereto, and then and there waived any objection to the same. Appellee filed a similar plea to the

first of the additional counts and a demurrer to each of the three counts

amended special pleas to which demurrers were sustained and appellant elected to abide by its pleas.

The principal question in this case is as to the sufficiency of the first amended plea which alleged that no suit or cause of action was started until July 27, 1923, when the amended declaration was filed, and also not until the additional counts were filed on December 10, 1923; that the declaration alleged the fire occurred on May 6, 1921, and that no suit was started on said policy until more than twelve months after the fire, setting out a provision of the policy prohibiting any suit unless commenced within twelve months after the fire.

Appellant contends that because the original declaration did not allege the specific date when notice of the fire was sent to appellant, which under the terms of the policy was to be given within a reasonable time; and the specific date when proof of loss was made, which under the policy was to be made within sixty days of the date of the fire, that the declaration did not state a cause of action, and that the additional counts which supplied these defects and alleged the waiver, set out a new cause of action, and were filed after the cause of action was barred by the statute of limitations. Appellee contends that the trial court did not err in sustaining the demurrer to this first amended plea, but that the declaration was a defective statement of a cause of action; that neither of the counts in the amended declaration nor the additional count stated a new cause of action; that the cause of action in each of the counts declared upon the same insurance policy, the same loss, the same notice, and the same proof as declared upon in the original declaration, and for this reason the cause of action was not barred by the statute of limitation, and for that reason the demurrer to the first amended plea was properly sustained.

Many cases have been cited on the question of the necessity of alleging a waiver of a proof of loss when such waiver is relied upon to excuse a failure to make a proof of loss. The cases cited are not uniform in their holdings. The following cases hold that the

...the original decision was a defective
...the first amended plea, but that the declaration was a defective
...the trial court did not err in sustaining the demurrer
...the cause of action was barred by the statute of limitations. Appellee
...the answer, set out a new cause of action, and were filed after
...the additional counts which supplied these defects and alleg-
...the time, that the declaration did not state a cause of action,
...the first amended plea, was to be made within sixty days of the date
...the specific date when proof of loss was made,
...the terms of the policy was to be given within
...the specific date when notice of the fire was sent to
...the original decision did become the original decision did
...the original decision was a defective
...the first amended plea, but that the declaration was a defective
...the trial court did not err in sustaining the demurrer
...the cause of action was barred by the statute of limitations. Appellee
...the answer, set out a new cause of action, and were filed after
...the additional counts which supplied these defects and alleg-
...the time, that the declaration did not state a cause of action,
...the first amended plea, was to be made within sixty days of the date
...the specific date when proof of loss was made,
...the terms of the policy was to be given within
...the specific date when notice of the fire was sent to
...the original decision did become the original decision did

4
waiver need not be specifically alleged, but may be proved under an issue alleging performance of all of the terms of the policy. German Fire Insurance Co. vs. Grunert, 112 Ill. 68; Evans vs. Howell, 211 Ill. 85; Gray vs. Merchants Insurance Co. 125 Ill. App. 374; Rosater vs. Peoria Life Assn. 149 Ill. App. 536; Harvick vs. Modern Woodmen, 158 Ill. App. 570; Downs vs. Michigan Commercial Ins. Co. 157 Ill. App. 32; Funk vs. Fire Association, 157 Ill. App. 602; Briggs vs. Bankers Insurance Co. 214 Ill. App. 187.

All doubt as to the rule, however, has been settled by the Supreme Court in the recent case of Feder vs. Midland Casualty Co. 316 Ill. 552. There the cases are fully reviewed, German Fire Insurance Company vs. Grunert, Supra, and Evans vs. Howell, Supra, are expressly overruled, and it is held that "there can be no recovery on a contract against one party whose performance is dependent on some act to be done or forborne by the other, unless the condition precedent has been fully or substantially performed by the plaintiff, or he has averred and proved a sufficient excuse for the non-performance."

Under this authority, if appellee desired to rely upon a waiver, it was necessary for him to specifically allege it, he did not do so until after the statute of limitation had run, the court improperly sustained the demurrer to the plea of the ^{statute} ~~statute~~ of limitations, and on account of that error the judgment will be reversed and the cause remanded.

Reversed and Remanded.

Reversed and Remanded.

of that error the judgment will be reversed and the cause

reversed the demurrer to the plea of the statute of limitations, and

will after the statute of limitation had run, the court improperly
the necessary for him to specifically allege it, he did not do

Under this authority, if appellee desired to rely upon a waiver,

he has waived and proved a sufficient excuse for the non-perfor-

cedent has been fully or substantially performed by the plaintiff,

and not to be done or performed by the other, unless the condition

a contract against one party whose performance is required or

contractly controlled, and it is held that "there can be no recovery

the contract, as, Grunert, Supra, and Evans vs. Howell, supra, are

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for
said Second District of the State of Illinois and keeper of the Records and Seal thereof, DO HEREBY
CERTIFY that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this 25th
day of Aug. in the year of our Lord one
thousand nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

in the year of our Lord one
and of the said Appellate Court, at Ottawa, this 22nd day
of January, 1890, I do hereby certify that the above
is a true and correct copy of the original as the same
appears in the records of the said Court.

abstract only

7473

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 644⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 27 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

Rehearing Denied Sept 26/25

D. F. Lavoie,
appellant,
vs.
C. F. Holliday,
appellee,

CONSOLIDATED.

D. F. Lavoie,
appellant,
vs.
Fred Giesecking,
appellee,

Appeal from the Circuit Court
of Kankakee County.

238 I.A. 644

Jett, J.

On June 10th, 1922, in the circuit court of Kankakee county, D. F. Lavoie, appellant, secured a judgment by confession against C. F. Holliday, appellee, in the sum of \$1043.47; and also on the same day and in the same court, the said D. F. Lavoie, appellant, secured a judgment by confession against Fred Giesecking, appellee, for the sum of \$311.08. After the entering of the judgment by confession, motions were made and allowed to open them up and for leave to the defendants to plead. Pleas were filed and a trial had. Previous to the trial, however, the two cases were consolidated, and were tried together, and a verdict was directed by the court in favor of the defendants. After the verdict had been rendered, the plaintiff, appellant here, made a motion to substitute H. F. Ruel, and A. J. Lemenager as plaintiffs for Lavoie. The court denied the motion and entered judgment upon the verdict and this appeal followed.

It appears that the notes in question were given to William Terman Produce Company, a corporation, in payment of the subscription of the respective defendants for capital stock in said company. There were certain agreements entered into between the company and the stock subscribers which were not incorporated in the notes. These

W. F. Lavee,

Appellant,

vs.

W. F. Collins,

appellee.

UNSUBMITTED.

W. F. Lavee,

Appellant,

vs.

W. F. Collins,

appellee.

238 I.A. 644

1922.

On June 10th, 1922, in the circuit court of Kanabek county, W. F. Lavee, appellant, secured a judgment of \$100.00 against W. F. Collins, appellee, in the case of 238 I.A. 644; and also in the same case in the same court, the said W. F. Lavee, appellant, secured a judgment of \$100.00 against W. F. Collins, appellee, in the case of 238 I.A. 644. After the entry of the judgment of \$100.00, motion was made and allowed to open up said judgment, and the defendant to plead. There were filed and a trial had. The case was then set for trial, however, the two cases were consolidated, and were tried together, and a verdict was returned by the court in favor of the plaintiff. After the verdict had been rendered, the plaintiff, William Lavee, made a motion to substitute H. F. Ruell, and A. J. [unclear] as plaintiff for Lavee. The court denied the motion and entered judgment upon the verdict and this appeal followed.

It appears that the notes in question were given to William Lavee by the [unclear] company, a corporation, in payment of the [unclear] of the [unclear] company, a corporation, for capital stock in said company. There are certain [unclear] entered into between the company and the

agreements were set up in the pleas filed by the defendants. After the notes were given, the company had some financial difficulties and in order to induce two of its stock holders to indorse its notes to the City National Bank of Kankakee, the Produce Company deposited the two notes on which judgments were entered together with other notes with the bank, as collateral security for the loan made by the bank. The deposit of such collateral was with the understanding that in the event the indorsers, H. F. Ruel and A. J. Lemenager were compelled to pay anything to the bank on its said notes, the collateral should be turned over to them. In the course of time, the said H.F. Ruel and A. J. Lemenager, indorsers, were compelled to pay the bank \$3484.72 and the bank in turn delivered the notes in question to said indorsers and the notes were then transferred by said indorsers through A. J. Lemenager to the plaintiff in the consolidated cases.

Appellant says that the only question for decision in this cause is the correctness of the ruling of the trial court in denying his motion to substitute H. F. Ruel and A. J. Lemenager as plaintiffs instead of Lavoie. The record is silent as to any formal transfer and indorsement to H. F. Ruel and A. J. Lemenager, but there is no doubt that it was the understanding among all concerned at the time the notes were deposited as collateral with the bank that they should be turned over to H. F. Ruel and A. J. Lemenager, if they were not paid in the meantime, and if said indorsers were compelled to pay the notes of the Produce Company to the bank.

H. F. Ruel and A. J. Lemenager assigned the same to Lavoie; the validity of this assignment has not been questioned. Lavoie, the appellant, cannot raise that question now and H. F. Ruel and A. J. Lemenager have not sought to do it.

The defenses set up in the pleas are that Lavoie was not an innocent purchaser and a holder in due course, and that there was a total failure of consideration. It is not denied that appellees did not receive any stock for which they gave the notes in question. They both testified that they did not receive any stock and Ruel who was a Director of said Terman Produce Company admits that no stock was

statements were set up in the plea filed by the defendants. After
the notes were given, the company had some financial difficulties
and in order to induce two of its stock holders to indorse the notes
the City National Bank of Baltimore, the trustees company deposited
the two notes on which judgments were entered against the stock
holders with the bank, as collateral security for the loan made by the
bank. The deposit of such collateral was with the understanding that
in the event the indebtedness of the company was not paid, the collateral
would be turned over to them. In the course of time, the said N.B.
bank and A. J. Lemmon, together, were compelled to pay the bank
the amount of the loan in full, and the bank in turn delivered the notes to them.
The notes and the notes were then transferred by said indorsers through
A. J. Lemmon to the plaintiff in the consolidated cases.
The plaintiff says that the only question for decision in this case
is the correctness of the ruling of the trial court in finding the
plaintiff to be entitled to the notes. H. F. Ruess and A. J. Lemmon as plaintiffs
admitted at law. The record is silent as to any formal transfer and
admission to H. F. Ruess and A. J. Lemmon, but there is no doubt
that it was the understanding among all concerned at the time the
notes were deposited as collateral with the bank that they should be
turned over to H. F. Ruess and A. J. Lemmon, if they were not paid
in the meantime, and if said indorsers were compelled to pay the notes
to the trustee company to the bank.
H. F. Ruess and A. J. Lemmon asserted the same to the jury; the
validity of this assignment has not been questioned. In fact, the
plaintiff cannot raise that question now and H. F. Ruess and A. J.
Lemmon have not sought to do it.
The defendant set up in the plea are that the plaintiff was not a
necessary party and a holder in due course, and that there was a
valid failure of consideration. It is not denied that appellees did
at various times and for which they gave the notes in question. They

issued. Other evidence was offered tending to sustain their pleas. Appellant insists that he was a bona fide holder for value before maturity and for that reason appellees were not in a position to set up the alleged defenses.

The Holliday note was executed July 20th, 1920, and the Giesecking note on July 26th, 1920, and each was due ninety days after date. The record discloses that the said notes were in the possession of the City National Bank until November 2nd, 1921, at which time they were long past due; that on the said second day of November, 1921, the said notes were received by H. F. Ruel, one of the endorsers on the notes to the said City National Bank of Kankakee.

From the evidence it appears that the defenses set up in the pleas have been sustained. The court was justified in refusing to direct a verdict for plaintiff and in denying the motion of plaintiff to substitute H. F. Ruel and A. J. Lemenager as plaintiffs in the case. The judgment of the circuit court of Kankakee county will be affirmed.

Judgment affirmed.

...and he was a good life holder for value before

[illegible]

The following case was reported July 1968, and the patient
was seen on July 1968. The patient had been ill since late June.

1. The National Health Service (NHS) is a public health system in the United Kingdom. It is a non-profit organization that provides a wide range of health services to the population. The NHS is funded by the government and is responsible for the majority of health care in the UK.

was found that on the said second day of November, 1981, the

...to the City National Bank of London.

have been examined. The court was justified in refusing to

the undersigned H. F. Ruel and A. J. Remeneger as plaintiffs in the

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTICE L. JOHNSON, Clerk of the Appellate Court,

of Illinois, and keeper of the Records and Seal thereof,

in view of the opinion of the said A.

WILLIAMS

do hereby certify that I have read and affixed the seal

of the said Court, this 25th day of

the year of our Lord one thousand

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 644⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 27 1925

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

5

(Name of the person)

Address of the person

City and State of the person

Page 1 of 1

RECEIVED: 1900

Mearl Shannon, a minor, by
Arthur Shannon, his guardian,

appellee,

vs.

Appeal from the Circuit Court
of Iroquois County.

William R. Nightingale and

John P. Pallissard,

appellants,

238 I.A. 644

Partlow, J.

Appellee, Mearl Shannon, a minor, by Arthur Shannon, his legal guardian, obtained a judgment for \$2750.00 in the circuit court of Iroquois county against appellants, William R. Nightingale and John P. Pallissard, who were doing business under the name and style of the Eastern Illinois Oil Company, on account of personal injuries sustained by Shannon in a collision between a Ford automobile in which he was riding and a truck alleged to be under the control of appellants. To review the judgment an appeal has been prosecuted to this court.

Shannon lived in Woodland, Illinois, which is south of Watseka. For about four years he had attended school in Watseka, driving back and forth, daily in an automobile. On October 10, 1923, he was a sophomore in the high school. On the evening of that day he left the high school in Watseka, for his home, in a Ford touring car accompanied by two companions, Harold Scott and Alfred Kruse. About one and two-thirds miles from the school house the road crossed the Keene bridge. Just before reaching the bridge there is a curve in the road. About 238 feet north of the bridge near the curve Shannon's car collided with a one and one-half ton Garford truck, weighing 5800 pounds, driven by Dale Pratt. Shannon was thrown to the ground and rendered unconscious. He was removed to a hospital, an operation performed, but he lost his left eye, had an injury to his arm, hip, and one tooth was knocked out. He later returned to school but could not study on account of sick-headache and biliousness. He quit school

West Shannon, a minor, by
 Arthur Shannon, his guardian,
 Appellee,
 Appeal from the Circuit Court
 of Indiana County.
 vs.
 William R. Nightingale and
 John R. Pellissari,
 appellants.

238 I.A. 644

Review, 1.

Appellee, West Shannon, a minor, by Arthur Shannon, his legal
 guardian, obtained a judgment for \$2750.00 in the circuit court of
 Indiana County against appellants, William R. Nightingale and John
 R. Pellissari, who were sole business under the name and style of
 the Eastern Illinois Oil Company, an account of personal injuries
 sustained by Shannon in a collision between a Ford automobile in
 which he was riding and a truck alleged to be under the control of
 appellants. To review the judgment an appeal has been prosecuted to
 this court.

Shannon lived in Woodland, Illinois, which is south of Watauga.
 For about four years he had attended school in Watauga, driving back
 and forth daily in an automobile. On October 10, 1933, he was a
 sophomore in the high school. On the evening of that day he left the
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 two-thirds miles from the school house the road crossed the Keene
 bridge. Just before reaching the bridge there is a curve in the road.
 About 238 feet north of the bridge near the curve Shannon's car
 collided with a one and one-half ton Getford truck, weighing 5000
 pounds, driven by Dale Pratt. Shannon was thrown to the ground and
 sustained considerable injuries. He was removed to a hospital, an operation
 performed, but he lost his left eye, had an injury to his arm, hip,

and has not resumed his study.

The declaration consisted of twelve counts and charged, 1. General negligence; 2. Wilful, wanton and reckless conduct; 3. Operating at a high and dangerous rate of speed; 4. Operating without giving any warning of approach to travelers; 5. Operating without carrying two lighted lamps visible 200 feet in the direction toward which the truck was proceeding; 6. Without displaying lights whereby the approach of the truck could have been known in sufficient time for persons using the highway to be warned; 7. Wilful, wanton and reckless operation of the truck knowing that the plaintiff was approaching the truck; 8. Operating at a speed greater than was reasonable and proper having regard for the traffic and use of the way; 9. Failure to turn to the right of the beaten track; 10. Operating during the hours from one hour after sunset to sunrise without carrying two lighted lamps as provided by statute; 11. Operating when it was dark without lighted lamps; 12. Wilful, wanton, and reckless operation without carrying lighted lamps as required by statute. To the declaration appellants filed the general issue and two special pleas. The first special plea denied that appellants were possessed of, managed, controlled, or operated the truck. The second special plea denied that Pratt, who was alleged to be their servant, was in fact their servant.

It is first argued that the verdict is contrary to the law and the evidence, and that Pratt was not guilty of the negligence charged in any count of the declaration. There is considerable conflict in the evidence as to the exact hour of the accident, whether it was before or after dark, and as to the rate of speed of the respective vehicles which collided. On the date in question the sun set at 5:18 o'clock. Shannon and his two companions remained after school to watch the football practice. They all testified they started home about 6:30 o'clock, and that the accident happened from five to fifteen minutes later. Several witnesses on behalf of appellants testified the accident happened from 5:45 to 6:00 o'clock. Several of these witnesses based their testimony as to the hour upon certain incidents which occurred at about that time. There was evidence

tending to show that within a very few minutes after the collision other automobiles arrived, and about five minutes later, Shannon was placed in Lemon's automobile and taken to the hospital. Lemon testified that about twenty minutes elapsed from the time of the accident until Shannon entered the hospital. The records of the hospital show that Shannon was received at the hospital at 6:30.

On the question as to whether the accident happened before or after dark, some of the witnesses testified it was light enough to see persons and objects at a distance, while others testified it was so dark that objects or persons could not be seen at a distance. The undisputed evidence, however, is that Shannon, before he reached the point of the accident, turned on his head lights, and they were burning at the time of the collision. One or two other automobiles which arrived almost immediately after the accident had their headlights burning. The undisputed evidence is that there were no lights on the truck driven by Pratt.

As to the rate of speed, Shannon testified that when he left the school house he was driving from twenty to twenty-five miles per hour, and in this he is corroborated by his two companions. He testified he drove at this rate to a point about one hundred yards north of the place of the accident when he shut off the gas, retarded the spark, and coasted, and that he was going about seventeen or eighteen miles an hour at the time of the collision. Other witnesses on behalf of the appellants testified that Shannon was driving at a higher rate of speed. Some of them put it as high as thirty-five or forty miles per hour.

There is also a conflict as to the rate of speed of the truck. Pratt testified he was driving slowly and carefully, and had almost stopped before the collision, while Shannon and his companions testified that the truck shot around the curve in the road and ran into Shannon before he had a chance to get out of the way. At the point of the collision the paved part of the highway was ten feet wide with gravel shoulders on each side, and both cars were apparently traveling

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other automobiles arrived, and about five minutes later, ...
...to the hospital. ...
...that about twenty minutes elapsed from the time of the collision
until Shannon entered the hospital. The records of the hospital show
that Shannon was received at the hospital at 8:30.
On the question as to whether the accident happened before or
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The majority testified, however, in their statements, before the coroner
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of the collision the paved part of the highway was ten feet wide with

partly at least, upon the paved portion of the road. Pratt testified that he saw Shannon's car when it was some distance away, while Shannon testified that on account of the curve in the road his headlight shot off into the distance and he did not see the truck until it was too late to avoid the accident.

It is insisted by appellants that under the statute they were only required to have the lights burning on the truck one hour after sundown, and that the evidence shows that the accident took place less than one hour after sundown, and for this reason there can be no recovery under the statutory counts of the declaration for failure to have the headlights burning. There is sufficient evidence to sustain the charge that the accident occurred more than one hour after sundown, and that Pratt did not have the lights burning on his truck. We have no doubt that if Pratt had been driving with his lights burning the collision would not have occurred. One of the strongest circumstances with reference to the hour of the accident and whether it was light or dark, is that Shannon had his lights burning and other automobiles which came up within a very short time thereafter also had their lights burning. It was at least so dark that these drivers deemed it necessary to turn on their lights, and if Pratt had exercised the same care and caution the injury would have been avoided. The question of the exercise of due care by Shannon, and the alleged negligence of Pratt, were questions of fact for the jury, and we do not feel justified in reversing the judgment as to these points on the ground that it is contrary to the manifest weight of the evidence.

It is very earnestly insisted that Pratt was not the agent and servant of appellants, and was not under their control and jurisdiction. The evidence shows that the truck was the property of Rose Loux. The appellants were engaged in the sale of oil. They made a contract with Mrs. Loux by which she furnished the trucks and drivers and delivered the orders as they were received. She was paid a certain amount per gallon for making deliveries and collecting therefor. The orders were taken by the drivers, or by Mrs. Loux, or by appellants, and placed on a hook and executed by the drivers. The appellants

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with the Loxs by which the truck and drivers and de-
liveries were to be made. She was paid a certain
amount for each delivery and collecting therefor. The

furnished gasoline to operate the trucks, but the oil, repairs and all other expenses of operation were defrayed by Mrs. Loux. The name Eastern Illinois Oil Company was painted on the truck. The drivers were paid weekly by checks of the Eastern Illinois Oil Company, and the amounts were charged against the commission account of Mrs. Loux, and monthly settlements were made therefor with her on the gallon basis, after deductions had been made for money paid out for her. The drivers upon making a delivery gave the customer a ticket with appellants' trade name thereon. If the transaction was cash, one color ticket was used, if credit was given, a different colored ticket was used, and the drivers would make a record of the transaction for appellants. The checks and tickets were furnished by appellants in book form. There was evidence tending to show that on the night of the accident Pratt went to appellants' office and reported the accident to Nightingale, one of the appellants. Shannon's father testified that on that night, Nightingale told the father that he, Nightingale had the supervision of the trucks, and this was not denied by Nightingale. In the application made by Pratt to the secretary of state for a license he stated that he was employed by W. R. Nightingale who signed Pratt's application for the license. There was evidence, however, that at the time this application was made Pratt was in fact working for Nightingale and afterwards entered the employ of Mrs. Loux.

It is insisted that these facts do not establish that Pratt was the servant and under the control of appellants, but that he was in the employ of Mrs. Loux and was under her management and control. It is claimed by appellants that they did not have the power to discharge the driver and therefore he was not their servant. The power to discharge is one of the tests as to the service. *Pioneer Construction Co. vs. Hansen*, 176 Ill. 100; *Connelly vs. People's Gas Co.*, 260 Ill. 162. A servant of one party, however, may be loaned or hired by his master to another person for some special service so as to become, as to such service, the servant of the second party. *Consolidated Fire Works Co. vs. Koehl*, 190 Ill. 145; *P.C.C. & St. L. Ry. Co. vs.*

... to operate the trucks, but the oil, repairs and ...
... expenses of operation were defrayed by Mrs. Bond. The name ...
... Illinois Oil Company was painted on the truck. The drivers ...
... weekly by checks of the Western Illinois Oil Company, and ...
... were charged against the commission account of Mrs. Bond. ...
... were made therefor with her on the 1st of ...
... had been made for money paid out for her. The ...
... a delivery gave the customer a ticket with ap- ...
... If the transaction was cash, one color ...
... a different colored ticket was ...
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... appellants' office and reported the ap- ...
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... People's Gas Co., ...
... A servant of one party, however, may be loaned or hired ...
... the servant of the second party. ...

Bovard, 233 Ill. 176; Perong vs. Endeikes, 223 Ill. App. 72. It has also been held in several cases that it is impossible to lay down a hard and fast general rule, or to state definite facts, by which the status of men working and contracting together can be definitely defined in all cases. Each case must depend upon its own facts. Ordinarily no one feature of the relation is conclusive but all of the facts must be considered together. Harding vs. St. Louis Stock Yards Co., 242 Ill. 444. The test is the right to control the manner of doing the work. Sinclair Company vs. Industrial Com., 317 Ill. 541; Grace & Hyde Co. vs. Probst, 208 Ill. 147. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between the independent contractor and a servant or agent. Decatur Railway & Light Co. vs. Industrial Board, 276 Ill. 472; Bristol & Gale Co. vs. Industrial Commission, 292 Ill. 16; Franklin Coal Co. vs. Industrial Commission, 296 Ill. 329; Foster vs. City of Chicago, 196 Ill. 254; Morris vs. Kuhn, Number 7281, decided by this court April term, 1923. In Densby vs. Bartlett, the Appellate Court of the First District, (Gen. No. 29048) reviewed the cases and announced the rules as above stated.

The question as to management, control and authority which appellants had the right to exercise over the driver of the truck, was a question of fact for the jury. The fact that the trade name of appellants appeared upon this truck was prima facie proof that they were the owners of the truck, and had power and authority over it, but appellants had the right to rebut this presumption. Pittsburg, Ft. Wayne and Chicago Ry. Co. vs. Callaghan, 157 Ill. 406; Foster vs. Wadsworth, 168 Ill. 514. From the terms of the contract between Mrs. Loux and appellants, the manner in which the business was handled, the fact that appellants furnished the gasoline to operate the trucks, directed Pratt where to go, required him to keep account of the goods which he delivered and collect therefor, the fact that the father of Shannon testified that Nightingale told him that he had supervision of the trucks, together with all of the other facts in evidence, we do not feel that we are justified in reversing the judgment upon the

...testified that Nightingale told him that he had expected
...delivered and collected therefor, the fact that the father of
...plaintiff furnished the gasoline to operate the trucks,
...and appellant, the manner in which the business was handled, the
...From the terms of the contract between Mrs.
...Chicago Ry. Co. vs. Callaghan, 157 Ill. 408; Foster vs.
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...City of Chicago, 192 Ill. 284; Morris vs. Kahn, Number 7831, de-
...vs. Franklin Coal Co. vs. Industrial Commission, 292 Ill. 322; Foster
...vs. Bristol & Gale Co. vs. Industrial Commission, 292 Ill.
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...that makes the difference between the independent contractor and a
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...vs. Probat, 208 Ill. 147. It is not the fact of
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...status of men working and contracting together can be definitely de-
...and that general rule, or to state definite facts, by which the
...Also been held in several cases that it is impossible to lay down a
...However, 222 Ill. 156; Perong vs. Embelton, 222 Ill. App. 72. It has

ground that the manifest weight of the evidence does not show that Pratt was the servant of appellants.

Complaint is made of the eighth instruction given on behalf of appellee. This instruction told the jury that in determining the damages, they should consider all the evidence, facts and circumstances bearing upon such question, and in connection therewith, they had the right to take into consideration their knowledge or experience in relation to matters of common observation. It is admitted that this instruction would have been proper if there had been other instructions which stated the correct rule of law as to the measure of damages, but that standing alone, it gave the jury authority to award such damages as they considered proper under the facts in the case and their knowledge and experience, and that no limit whatever was set. We do not think this instruction is capable of the interpretation placed upon it. It did not direct a verdict. Some of the counts of the declaration charged wilful and wanton negligence, and therefore exemplary damages might have been assessed. Similar instructions have been approved. *Orr vs. Wahfeld Mfg. Co.*, 179 Ill. App. 235; *Hatcher vs. Quincy Horse Car Co.*, 181 Ill. App. 30; *Springfield Consolidated R.R. Co. vs. Hoeffler*, 175 Ill. 634; *North Chicago St. Ry. Co. vs. Fitzgibbons*, 180 Ill. 466; *Keokuk Bridge Co. vs. Wetzel*, 228 Ill. 253. Even if the instruction was erroneous, it is apparent that no injury was occasioned by giving it. The jury assessed \$2750.00. The injuries sustained were of a permanent nature and disfigured Shannon for life. The jury apparently was not moved by any improper motive in the assessment of damages.

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
August in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
the State of Illinois and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true and correct copy of the
opinion of the said Appellate Court.

I hereunto set my hand and affix the seal of
the State of Illinois, this 27th day of
October, 1901, at Ottawa, Illinois.
The seal of our Lord, one thousand

Abstract only

7497

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 645¹

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 27 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

Rehearing Denied Sept 26, 1925

The Hon. NORMAN L. JONES, Presiding Justice

PARTLOW

DR. THOMAS M. JETT, Justice

JUSTUS L. JOHNSO, Clerk.

W. E. J. WELTER, Sheriff.

IT REMEMBERED, that afterwards, to-wit: in
the opinion of the Court was filed in the
file of said Court, in the words and figures

Loretta Thompson,

appellee,

vs.

Appeal from the Circuit Court
of Will County.

Lloyd M. Stevens,

appellant,

238 I.A. 645

Partlow, J.

Appellee, Loretta Thompson, recovered a judgment of \$4000.00 in the circuit court of Will county against appellant, Lloyd M. Stevens, for alleged malpractice as a dentist. To review the judgment an appeal has been prosecuted to this court.

The declaration consisted of one count and alleged that appellant was a dentist and that appellee employed him to extract a tooth; that the tooth was extracted and appellant continued the treatment thereof for the space of thirty days, and not regarding his duty as such dentist, during that time so unskillfully and negligently conducted himself in that behalf that by and through his want of skill and care, appellee became and was greatly injured, disfigured, reduced and weakened in body, during which time she suffered great pain, was hindered from transacting her business, and was required to pay out large sums of money.

The evidence shows that appellant had practiced dentistry in the city of Joliet since January 1, 1917. Appellee was twenty-six years of age, married, and had a small son. Her husband worked in the steel mills. She did her household work and was in reasonably good health except that she had been troubled with a swelling of her ankles in 1921. In the spring of 1921, appellee had five teeth extracted by appellant and a bridge put in her mouth. In the early part of 1922, she again went to appellant for the purpose of having a small root extracted. At this time appellant examined her teeth and found a cavity in one of her molars. She asked him to file the cavity and he told her he thought he had better pull the tooth. A day or two later

Lorella Thompson,

Appellant from the Circuit Court

Appellee,

of Will County.

vs.

Edgar A. Stewart,

Appellant,

2381 A. 645

Verdict, 5.

Appellee, Lorella Thompson, recovered a judgment of \$500.00 in

the Circuit Court of Will County against appellant, Edgar A. Stewart,

for alleged malpractice as a dentist. To review the judgment an

appeal has been presented to this court.

The declaration contained of one count and alleged that appellant

is a dentist and that appellee employed him to extract a tooth; that

the tooth was extracted and appellant continued the treatment thereof

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ied, during that time so unskillfully and negligently conducted him

self in that behalf that by and through his want of skill and care,

appellee became and was severely injured, afflicted, weakened and

weakened in body, during which time she suffered great pain, was disabled

in from transacting her business, and was required to pay out large

sums of money.

The evidence shows that appellant had practiced dentistry in the

city of Joliet since January 1, 1914. Appellee was twenty-six years

of age, married, and had a small son. Her husband worked in the steel

mill. She did her household work and was in reasonably good health

except that she had been troubled with a swelling of her ankles in

1914. In the spring of 1914, appellee had two teeth removed by

appellant and a bridge put in her mouth. In the early part of 1922,

she went to appellee for the purpose of having a small root

extracted. At this time appellant examined her teeth and found a

small root in her mouth. She asked him to fill the cavity and he

an X-ray was taken which disclosed pus at the root. On April 17, 1922, Dr. Welch, a physician, gave appellee an anesthetic and appellant attempted to extract this tooth. In so doing it broke off, leaving about one-fourth of it in the jaw. He informed her he would not at that time remove the root, but that it would gradually work out and could be extracted later with much more ease. Appellee returned to her home and in three or four days became sick. She began to feel a chilliness, a loss of appetite and thought she had contracted a cold. She claims she called appellant several times, told him of her condition, and informed him she was gradually getting worse. He told her there was nothing the matter with her, that she would be all right, and all she needed was Christian Science. On May 6, another X-ray was taken and appellee went to see Dr. Welch, who examined her. The next day was Sunday, and appellee testified she called appellant, told him she was very ill, and he told her to come to his office the next day and he would extract the root. She went to the office the next day with her husband. The office girl of appellant administered the anesthetic. Appellant extracted the root. After it was extracted appellee became very sick. She was partly unconscious, clotted blood filled her mouth, her jaws became rigid so she could not open her mouth. Appellant and her husband tried to get the blood out of her mouth. Dr. Welch was sent for and gave her a hypodermic injection of morphine. She was removed to her home. She testified she did not remember much that took place in his office, nor that she had been removed to her home, nor anything that took place after she got there. She continued to get worse. There was a swelling on the side of her face, neck and shoulder. The next day appellant visited her and called Dr. Bloomfield to make an examination. She had a fever of from 100 to 104. Dr. Bloomfield prescribed for her but only made one visit. The next day Dr. Schreffler, her family physician, was called. He testified he found she had osteomyelitis of the jaw, which was an abscess of the jaw; that it was similar to a boil, was due to infection, and was a well recognized disease; that fever, chilliness and nausea, following injury to a bone, are its symptoms; that it is a dangerous disease and

On April 14, 1932, an X-ray was taken which disclosed pus at the root.

Dr. Welch, a physician, gave appellee an anesthetic and attempted to extract this tooth. In so doing it broke off, leaving about one-fourth of it in the jaw. He informed her he would not attempt to remove the root, but that it would gradually work out and would be extracted later with much more ease. Appellee returned to her home and in three or four days became sick. She began to feel a chilliness, a loss of appetite and thought she had contracted a cold. The claims she called appellee several times, told him of her condition, and informed him she was gradually getting worse. He told her there was nothing the matter with her, that she would be all right, and all she needed was Christian Science. On May 6, another X-ray was

taken and appellee went to see Dr. Welch, who examined her. The next day she called appellee and testified she called appellee, told him she was very ill, and he told her to come to his office the next day and he would extract the root. She went to the office the next day with her husband. The office girl of appellee administered the anesthetic. Appellant extracted the root. After it was extracted appellee became very sick. She was partly unconscious, fainted blood filled her mouth, her jaw became rigid so she could not open her mouth. Appellant and her husband tried to get the blood out of her mouth. Dr. Welch was sent for and gave her a hypodermic injection of morphine. She was removed to her home. She testified she did not remember much of what took place in his office, nor that she had been removed to her home, nor anything that took place after she got there. She continued to get worse. There was a swelling on the side of her face, neck and shoulder. The next day appellee visited her and called Dr. Bloomfield to make an examination. She had a fever of from 100 to 104. Dr. Bloomfield prescribed for her but only made one visit. The next day Dr. Bloomfield, her family physician, was called. He testified he found she had osteomyelitis of the jaw, which was an abscess of the jaw, that it was similar to a boil, was due to infection, and was a

that good medical practice requires that it be opened and given drainage; that there is danger of it causing death. On the following day appellee was removed to the hospital and Dr. Schreffler performed three operations for the purpose of opening the abscess, and cleaning secondary abscesses which developed. In order to do this it was necessary to cut through the side of the face or neck and three incisions were made which left ugly scars. The disease was arrested but the evidence shows that appellee since that time has practically no use of her jaws. She can only open her mouth about three-fourths of an inch. Part of the time she has been fed by liquids through a tube inserted where a tooth had been removed. ~~Appellee~~ After appellee left the hospital, for about one year, she paid weekly visits to Chicago to Dr. Gilmer, who was connected with the Northwestern University. He treated her in an effort to open her jaws, but at the time of the trial she was only able to open them about three-fourths of an inch. Appellee proved the amounts she had paid for medical attention and hospital bills aggregating a considerable sum.

At the conclusion of the trial and before the jury had brought in their verdict, appellee asked leave to amend the declaration so as to allege due care on her part which had been omitted from the original declaration. Leave was granted and the amendment was made by interlineation. Before the motion for a new trial had been heard, or judgment entered, appellee withdrew this motion and the court entered an order expunging this amendment from the declaration. At the close of all the evidence a motion was made by appellant to direct a verdict in his favor which motion was overruled. After the motion for a new trial had been overruled, appellant made a motion in arrest of judgment which was overruled. It is claimed by appellant that this was error for the reason that the declaration did not state a cause of action because it did not allege that at the time of the injury appellee was in the exercise of due care.

Many cases are cited in support of this contention. Appellee should have alleged that at the time of the injury she was in the exercise of due care. A declaration which omits this allegation is

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age; that there is danger of its causing death. On the following day
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relief. Leave was granted and the amendment was made by inter-
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nt was in the exercise of her duty.

defective and subject to demurrer. In this case, however, no demurrer was interposed. Appellant filed a plea of the general issue. For that reason most of the cases cited by appellant are not in point.

In *Krauss vs. Ballinger*, 171 Ill. App. 534, it was held that the question of contributory negligence and assumed risk did not arise in that case. This was a malpractice case in which an arm had not been properly set. It was held that if the appellants did not set the arm properly they might be liable even if appellee did not in every particular carry out their instructions; that appellants might be liable if their treatment of the arm subsequent to the setting was improper, although the appellee did not in all respects carry out their instructions.

In *Peters vs. Howard*, 206 Ill. App., on page 619, the court said: "No claim is made by appellant that appellee did not exercise ordinary care, or that there was any contributory negligence on her part when the burns were inflicted. The evidence discloses that she was not in a condition physically or mentally to exercise any control over herself, so that while the instruction was theoretically erroneous in omitting the necessary requirements of ordinary care on her part, the proof shows beyond a doubt that she was in the exercise of ordinary care of a person in her situation, and that she was not guilty of contributory negligence."

In the last case cited there was no allegation that the plaintiff was in the exercise of due care. They were both malpractice cases, and the rule there announced is applicable to the facts here presented. The evidence in this case shows that appellee went to the office of appellant, put herself under his care, and an anesthetic was administered. She was practically unconscious while the root was being extracted. There is not a particle of evidence that she was not in the exercise of due care.

There is another reason why the motion in arrest of judgment was properly denied. In *Andrews vs. Chicago, Lake Shore & Eastern Railway Co.*, 222 Ill. 232, the rule is announced that if the declaration omits to allege any substantial fact which is essential to a right of

allocative and subject to demurrer. In this case, however, no demurrer was sustained. Appellant filed a plea of the general issue. For the reasons cited in the cases cited by appellant are not in point. In *Laurens v. Williams*, 171 Ill. App. 524, it was held that the question of contributory negligence and assumed risk did not arise in this case. This was a malpractice case in which an arm had not been properly set. It was held that if the appellants did not set the arm properly they might be liable even if appellee did not in every particular carry out their instructions; that appellants might be liable if their treatment of the arm was negligent in the setting was improper. Although the appellee did not in all respects carry out their instructions. In *Peters v. Howard*, 206 Ill. App. on page 619, the court said: The claim is made by appellant that appellee did not exercise ordinary care, or that there was any contributory negligence on her part when the arm was set. The evidence discloses that she was not in a position physically or mentally to exercise any control over her arm, at that while the instruction was theoretically erroneous in setting the necessary requirements of ordinary care on her part, the court shows beyond a doubt that she was in the position of contributory negligence. In the last case cited there was no allegation that the plaintiff was in the exercise of due care. They were both malpractice cases. and the rule there announced is applicable to the facts here presented. The evidence in this case shows that appellee went to the office of appellant, got her arm set, and an assistant was present. She was practically unconscious while the arm was being set. There is not a particle of evidence that she was not in the exercise of due care. There is another reason why the motion in arrest of judgment was properly denied. In *Laurens v. Williams*, *Laurens v. Williams*, *Laurens v. Williams*, the rule is announced that if the declaration

action and which is not implied in or inferable from the findings which are alleged, a verdict for the plaintiff does not cure the defect, citing *Foster vs. St. Luke's Hospital*, 191 Ill. 94. The converse of this proposition must also be true, namely, that if such material facts can be implied or inferred from the findings of those facts which are alleged a verdict for the plaintiff will cure the defect. This rule was also announced in *Vose vs. Central Illinois Public Service Co.*, 212 Ill. App. 105.

In *Baltimore & Ohio Railway Co. vs. Then*, 159 Ill. 535, on page 536, it was said: "On behalf of appellant, it is urged that the motion in arrest of judgment should have been sustained on the ground that there was no averment in the declaration, that deceased was in the exercise of due care at the time of the accident. Conceding the declaration to have been demurrable because of such omission, it does not follow that after verdict, a motion in arrest of judgment, based on such defect, should be sustained. Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so imperfectly or defectively stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by verdict." To the same effect are *Gerke vs. Fancher*, 158 Ill. 375; *Szerniak vs. City of Chicago*, 161 Ill. App. 360; *Foster vs. Shepherd*, 164 Ill. App. 199; ~~Bernier~~ *Bernier vs. Illinois Central Railroad Co.*, 213 Ill. App. 530; *Paden vs. Chicago, Rock Island & Pacific Railway Co.*, 276 Ill. 62.

In the case at bar the omission from the declaration of an allegation of due care on behalf of appellee was cured by verdict, and the court properly overruled the motion in arrest of judgment.

It is next insisted that the court improperly refused appellant's motion to direct a verdict; that there is no evidence tending to show that appellant was guilty of negligence or want of skill, or in the treatment administered by him, or that the injury complained of was

[illegible]

the result of any improper or unskillful treatment; that the court improperly refused to grant a new trial for the reason that the verdict is manifestly against the weight of the evidence.

Appellant testified to the circumstances attending the extraction of the tooth on April 17, 1922; that she went home and felt all right for two or three days, when she felt a chilliness, a loss of appetite, was very weak, and thought she had contracted a cold. She called appellant, told him how she felt, and he told her not to pay any attention to it; that it was her imagination and she would be all right. She kept getting worse, and three or four days later could not get up alone and had to lie in bed; that she again called appellant and told him she felt nauseated, vomitted, could not sleep, was restless, and it was hard to raise her arms; that the second time she called appellant he told her she was all right and needed Christian Science. She testified she called him a third time on Sunday, May 7, and he told her to come down and he would extract the root. She went to the office ~~and~~ ^{the} next day and made complaint because Dr. Welch was not there. The office girl administered the anesthetic, the root was extracted, she became very sick, Dr. Welch was called, and she was removed to her home and continued to get worse. Appellant came the next day, and then sent Dr. Bloomfield. Dr. Schreffler was called and removed her to a hospital. She is corroborated in many respects by her husband, mother, sister, and at least one other witness.

Dr. Schreffler testified he called on her on May 12, 1922. She had a temperature of 104. Her neck was very much swollen around the jaw; she had a fast pulse and the jaw was inflamed somewhat. He diagnosed her case as osteomyelitis of the jaw, a deep abscess of the jaw similar to a boil, caused by a bacteria infection, first of the bone marrow, then of the bone structure and small parts of the hard portion of the bone; that the symptoms described by appellee were the symptoms that indicate osteomyelitis to a professional man; that common medical opinion as to the treatment of osteomyelitis is to open it and give it drainage; to attempt to delay the progress is dangerous; that it is a dangerous disease and may cause death; that the treatment he gave her was an incision to get drainage; that if a

the result of any improper or unskillful treatment; that the court properly refused to grant a new trial for the reason that the ver-
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get up alone and had to lie in bed; that she again called appellant
and told him she felt nauseated, vomited, could not sleep, was rest-
less, and it was hard to raise her arms; that the second time she call-
ed appellant he told her she was all right and needed Christmas
vacation. She testified she called him a third time on Sunday, May 7,
and he told her to come down and he would extract the tooth. She went
to the office the next day and made complaint because Dr. Welch was
late. The office girl administered the anesthetic, the tooth was
extracted, she became very sick, Dr. Welch was called, and she was re-
moved to her home and remained in bed some. Appellant and the
other witnesses testified that Dr. Welch was called and re-
mained in the hospital. She is corroborated in many respects by her
mother, mother-in-law, and at least one other witness.
The doctor testified he called on her on May 12, 1932. She
testified that her neck was very much swollen around the
tooth. She had a fever and the jaw was inflamed somewhat. The
doctor testified that as a bacteriologist of the jaw, a deep abscess of
the jaw is a fatal, caused by a bacterial infection, that of
the bone marrow, then of the bone structure and small parts of the
soft parts of the jaw that the symptoms described by appellant were
typical of a fatal bacterial infection. It is his opinion that
the medical opinion as to the treatment of this infection is to
give it drainage; to remove the infected tissue; to give

patient had osteomyelitis, whether or not it would be proper or improper treatment to extract the tooth while suffering from that disease, would depend a good deal on where the abscess was; that when he examined her there was some limitation in the motion of the jaw.

Appellant in his own behalf testified that when he extracted the tooth in June 1921, one was a molar, and he had to extract twice to get it; that there was no apparent difference in the size of the molar extracted in 1921 and the one removed in 1922; that before extracting the tooth in question he had an X-ray taken, which disclosed pus at the root, and that was the cause of the extraction; that if it had not been extracted the pus would continue to go through the system; that the root did not project above the gums; that he told appellee to keep her mouth as clean as possible with antiseptic washes, and that he would remove the root at a later date; that it would then be much easier to do so, and there would be no danger of a fracture of the jaw; that from his experience as a dentist the root would come out easier after a certain length of time; that there was no fracture of the jaw when the root was extracted; that there was no definite way by which he could tell how long the infection had been at the root; that it had been there for some time because there had been a destruction of the bone around the end of the root, showing that the pus had eaten the bone to some extent; that pus does not affect the root in earlier stages, but affects the surrounding bone; that it is almost universal to have swelling follow the removal of a molar; that the fact that she complained did not indicate there was anything out of the ordinary as the result of the extraction, or to indicate there would be any bad results following the extraction. In all cases where there is infection at the root it is common to have pain and swelling in the jaw following the extraction; that an extraction is always painful; that when the root was removed it was without difficulty, the jaw was not fractured; that after the removal of the root he washed out the socket and painted it with iodine to kill bacteria; that when he saw her the next day her face was swollen and she complained of pain; that there was nothing unusual in this;

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gum; that the root did not project above the gums; that he told
her to keep her mouth as clean as possible with antiseptic
solution, and that he would remove the root at a later date; that it
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fracture of the jaw; that from his experience as a dentist the root
will come out easier after a certain length of time; that there was no
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infection by which he could tell how long the infection had been
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that it occurs in ordinary cases of extraction; that the swelling was caused by the general physical condition of the patient and the infection; that the manner in which he treated appellee was the usual and customary method of dentists generally treating patients where teeth are extracted. He testified that he knew the general symptoms of osteomyelitis; that if there had been a violent injury to the bone, such as drawing a tooth, or something of that sort, and then these symptoms followed, they would indicate to an ordinarily careful and skillful dentist that osteomyelitis was or might be present, and if it was present, it required immediate attention; that if that disease was present in a well woman it would be good practice of dentistry to draw the remainder of the tooth when that disease was in the jaw; that it was considered generally by dental surgeons that when the disease was present anything that tended to excite the area was dangerous and nothing should be done except to drain the pus. He then testified with reference to the various times he was called by appellee.

Dr. Stansbury, a dentist, testified that the usual and customary way of treating a patient was first to make the field as sterile as possible, to paint the tooth with iodine, and remove the tooth; that after the tooth had been removed, the future treatment depended upon circumstances; that if it was a serious case the socket should sometimes be packed, and the patient should return the following day to have the socket washed out, and probably two days later come again, in fact the patient should come back until it was certain that everything was all right; that in his practice he had teeth break frequently; that it was not unusual for swelling to follow extraction; that swelling was natural from the irritation caused by removing the tooth; that generally a tooth is not removed unless it is infected; that if a tooth is fractured and one-fourth of it remains in the jaw there is no specific time within which the root should be taken out; that it will come out easier if given time; that if the patient was unable to come to the office after an extraction, and the dentist went to her house and found her in bed, whether he called a physician would depend upon the circumstances; that osteomyelitis is a disease which every dentist knows something about.

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it was considered generally by dental surgeons that when the disease
was present, especially that located to make the case was dangerous
and that it would be wise enough to extract the tooth. He then testified
that in the various cases he called to attention.
Dr. Kennedy, a dentist, testified that the usual and ordinary
practice of treating a patient was first to make the field as sterile as
possible, to paint the tooth with iodine, and remove the tooth with
forceps, and then remove the entire fragment if possible; that if it
was a serious case the whole would be
removed; that if it was a serious case the whole would be
removed; and the patient would require the following day to
be in bed, and the patient would require the following day to
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a tooth is fractured and one-fourth of it remains in the jaw there
is no special time when the tooth should be taken out; that
it will come out sooner or later; that at the patient was usually
brought to the office after an extraction, and the swelling would be
seen and treated as in bed, whether he called a physician or not.

Dr. Young, a dentist of ten years experience, testified that he had extracted hundreds of teeth that had fractured; that when he extracted a tooth he first examined the tooth to see whether he should take it out; that he painted the field with iodine as a precautionary measure; that the presence of pus indicated there was a pus pulp in the tooth; that there are infections at the roots of teeth that are not caused by any treatment of the tooth; that it is proper practice to remove a tooth where there is pus at the base; that after a tooth breaks there is no set time within which the root should be taken out. It is easier to remove it by giving it time; that it is ordinarily impossible to get the root without injury; that dentists use their judgment, and nature tries to throw out the root; that he had extracted hundreds of teeth and never looked at the patient after an extraction.

Dr. Bloomfield testified that when he saw the appellee, the right side of her face and jaw were swollen; that her temperature was 100 to 101; that he examined her and advised her to use hot dressings; that the condition which he observed was caused by a tooth extraction due to trauma which means injury; that in the removal of the tooth the dentist lacerates the gum which is necessary; that there was no fracture of the jaw in this case; that he would have found it if there had been; that the extraction of molars often causes swelling which is not unusual; that the swelling usually subsides in a day or two; that the low resistance of the individual allows infection to take hold easier, and that the general physical condition would have something to do with the swelling which he observed.

The negligence charged in the declaration was that the appellant so unskillfully and negligently conducted himself that by and through his want of skill and care, appellee was injured. We agree with appellant that the mere fact that there were bad results from the extraction is not sufficient to prove the negligence charged in the declaration. Sims vs. Parker, 41 Ill. App. 284; Quinn vs. Donovan, 85 Ill. 195; Blodgett vs. Nevius, 189 Ill. App. 544. In order for appellee to recover it was necessary for her to prove by a preponderance of the

Dr. Young, a dentist of ten years experience, testified that he
examined the teeth of the plaintiff and that he had fractured;
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extract it or not; that he pointed the field with feeling as a precautionary
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the tooth; that there are infections at the roots of teeth that are
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is removed there is no set time within which the root should be taken out.
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court that the facts that there were bad results from the extraction
are not sufficient to prove the negligence charged in the declaration.
Dr. Young, 22 Ill. App. 284; Quinn vs. Donovan, 22 Ill. 125;
Dr. Young, 22 Ill. App. 244. In order for appellee to

evidence the specific charges in the declaration, namely: - that appellant was unskillful, or negligent. It is insisted by appellant that in order to prove that appellant was unskillful and negligent, it was necessary to do so by the testimony of expert witnesses, and that such proof does not appear in the record. We do not deem it necessary to determine whether or not such negligence must be proven by the testimony of expert witnesses for the reason that if the judgment is sustained, it will have to be on the ground that the evidence of expert witnesses shows that appellant was guilty of the negligence charged.

When appellee went to appellant and had her teeth examined he found a cavity in the tooth in question. An X-ray was taken which disclosed pus at the root. Appellant told appellee the tooth should not be filled but should be pulled. We think, under the evidence presented, this decision was in accordance with good practice in dentistry. When appellant attempted to pull the tooth, it broke off, and the evidence shows that this is not an uncommon occurrence, and is something that cannot be foreseen. He left the root in the jaw, waiting for nature to loosen it, when it might be removed with less difficulty than at that time. We think the evidence sustains this practice, and that in none of these acts was the appellant unskillful or negligent.

After appellee went to her home she did not have any particular difficulty for three or four days, when she became sick, suffered considerable pain, had nausea, felt that she had a cold, and was confined to her bed. The evidence of the dentists who testify in this case is to the effect that after a tooth has been extracted, it is proper practice for the dentist to have the patient come back from time to time and administer such treatment as may be necessary until the socket has fully healed. This was not done by appellant. When appellee became sick she called appellant and told him her symptoms and asked him if it could be on account of the root. He said he did not think it was, and he thought it would be all right. She continued to get worse and called appellant the second time, told him she was

The evidence shows that appellant was negligent and negligent in order to prove that appellant was negligent and negligent. It is insisted by appellant that such proof does not appear in the record. We do not deem it necessary to determine whether or not such negligence must be proven by the testimony of expert witnesses for the reason that if the evidence of negligence shown by the testimony of expert witnesses is sufficient to establish negligence, it will have to be on the ground that the evidence of negligence shown by the testimony of expert witnesses is sufficient to establish negligence. When appellee went to appellant and had her teeth examined in appellant's office, appellant told appellee the teeth were all right and that they should be pulled. We think, under the evidence presented, this action was in accordance with good practice in dentistry. When appellee attempted to pull the tooth, it broke off, and the evidence shows that this is not an uncommon occurrence, and is something that cannot be foreseen. He left the root in the jaw, which for nature is better so, when it might be removed with less difficulty than at that time. We think the evidence sustains this verdict, and that in none of these acts was the appellant negligent or negligent.

After appellee went to her home she did not have any further difficulty for three or four days, when she became sick, suffered severe pain, had nausea, felt that she had a cold, and was confined to her bed. The evidence of the dentist who testified in this case as to the effect that after a tooth has been extracted, it is a great practice for the dentist to leave the patient some pain killers to take and administer as treatment as may be necessary until the wound has fully healed. This was not done by appellant. When appellee became sick she called appellant and told him her symptoms and asked him if he could be on account of the root. He said he did not know what it was, but that she should see a doctor.

getting worse, and she wondered what was the matter. He replied that all she needed was Christian Science and she would be all right. Still later she again called and told him she was very ill, and he told her she would have to come down and have the root taken out. She went down the next day and an X-ray was taken. What the X-ray showed does not appear from the evidence. On May 8, almost three weeks after the tooth was extracted, the root was taken out. During all this interval appellant did not see appellee on but one occasion, which was just prior to the time the root was extracted, although he had been repeatedly called. It appears from the evidence that it was proper and necessary practice for him to have looked after the patient to see that she was getting along all right, knowing that she had pus at the root of her tooth. He entirely neglected her and did not respond to her repeated appeals. Whether under the evidence this was proper practice, and whether he neglected her, were questions of fact for the jury, and we cannot say that the jury was not justified in holding that he was negligent in this respect.

The evidence shows that osteomyelitis is a disease well known to physicians and dentists; that it sometimes develops very rapidly, is a dangerous and sometimes a deadly disease; that it has well defined symptoms; that those symptoms appeared in appellee, and she told appellant what the symptoms were. Appellant testified he was familiar with osteomyelitis and knew its symptoms. The evidence shows that when a patient is suffering from osteomyelitis, that nothing should be done to the injured area; that the proper treatment is to make an opening at the point of injury and drain the pus. When appellee went to appellant's office to have the root extracted, he learned from her, and according to her testimony she had told him prior thereto, the symptoms from which she was suffering. On that morning she had been confined to her bed and had to be assisted to the office. It is apparent from the evidence that if the appellant was the skilled dentist he claims he was, he should have recognized the symptoms which appeared and about which he had been told, and that it was not proper dental practice for him to disturb the seat of the difficulty. Yet he proceeded to extract

...worse, and she worried about the matter. He replied that
if the dentist was Christian Science and she would be all right, still
that she again called and told him she was very ill, and he told her
she would have to come down and have the root taken out. She went down
the next day and an X-ray was taken. What the X-ray showed does not
appear from the evidence. On May 8, almost three weeks after the
root was extracted, the root was taken out. During all this interval
Appellant did not see Appellee on but one occasion, which was just
prior to the time the root was extracted, although he had been re-
peatedly called. It appears from the evidence that it was proper and
necessary practice for him to have looked after the patient to see
that she was getting along all right, knowing that she had one at the
root of her tooth. He entirely neglected her and did not respond to
her repeated appeals. What under the evidence this was proper
neglect, and whether he neglected her, were questions of fact for the
jury, and we cannot say that the jury was not justified in holding
that he was negligent in this respect.

The evidence shows that osteomyelitis is a disease well known to
dentists and dentists; that it sometimes develops very rapidly, is
sometimes and sometimes a deadly disease; that it has well defined
symptoms; that these symptoms appeared in Appellee, and she told
Appellant what the symptoms were. Appellant testified he was familiar
with osteomyelitis and knew its symptoms. The evidence shows that
Appellant's patient is suffering from osteomyelitis, that nothing should be
done to the injured area; that the proper treatment is to make an open-
ing at the point of injury and drain the pus. When Appellee went to
Appellant's office to have the root extracted, he learned from her, and
from her testimony she had told him prior thereto, the symptoms
which she was suffering. On that morning she had been confined
to her bed and had to be assisted to the office. It is apparent from
the evidence that if the Appellant was the skilled dentist he claims
to be, he should have recognized the symptoms which appeared and about

this root, and as a result appellee's mouth immediately became filled with clotted blood, her jaws became set, she could not open her mouth, and her jaws have remained in practically that condition ever since. At that time she was in a semi-conscious condition, and she testified she did not know when she was taken home, or what occurred after she got there. There is sufficient evidence tending to prove the charges of unskillfulness and negligence against appellant, to justify the trial court in refusing to direct a verdict. It is only when the verdict is manifestly against the weight of the evidence that this court is justified in setting aside the verdict of a jury. We have given this case considerable care and attention. We are convinced there is sufficient evidence to justify the jury in believing that appellant, not only was unskillful in his treatment of appellee, but also that he was negligent and careless in that treatment. For these reasons we do not feel justified in reversing the judgment on account of the evidence.

Complaint is made of the eighth instruction given on behalf of appellee. This instruction recites the various facts which are necessary for the jury to determine before appellee would be entitled to a verdict. The complaint is that it directs a verdict and authorizes a recovery for negligence generally without limiting the right of recovery to the negligence charged in the declaration. We do not think there is any merit in this contention. The instruction follows the allegations of the declaration, and tells the jury that if they believe from the evidence that the appellant did not extract and treat the tooth with the skill, knowledge, care, prudence and caution which an ordinarily skillful, prudent and careful dentist would exercise under similar circumstances, and by reason thereof the appellee was injured, she is entitled to recovery. We find no error in this instruction.

The fifth instruction on behalf of appellee told the jury that under the law the husband of appellee was a competent witness, and if they believed his testimony was fair, was not unreasonable, was consistent in itself, and the witness had not been impeached, then they

...and as a result appellant's words inevitably became true. With slight effort, but having become old, she could not open her mouth and her jaws have remained in practically that position ever since. At that time she was in a semi-conscious condition, and she testified she did not know when she was taken home, or what occurred after she was taken home. There is sufficient evidence tending to prove the charges of negligence and negligence against appellant to justify the verdict in refusing to direct a verdict. It is only when the verdict is manifestly against the weight of the evidence that this court is justified in setting aside the verdict of a jury. We have given this case considerable care and attention. We are convinced there is sufficient evidence to justify the jury in believing that appellant was negligent in his treatment of appellee. We are also convinced that he was negligent and careless in that treatment. For these reasons we do not feel justified in reversing the judgment on account of the evidence.

The fifth instruction on behalf of appellee told the jury that

had no right to disregard his testimony merely from the fact that he was related by marriage to the appellee. The objection is that it singles out and calls particular attention to this witness; that his credibility should be determined by the same standard as is applied to any other witness; that if this instruction is good, a similar instruction could have been given for the mother and sister of appellee and any other witness. An instruction almost identical with the one in question was approved in *North Chicago Street Railway Company vs. Wellner*, 206 Ill. 272.

The sixteenth instruction refused on behalf of appellant, told the jury that before appellee could recover, she must prove, by expert evidence of dentists or doctors, that her injury complained of resulted from want of ordinary care and skill practiced by reasonable and skillful dentists in that locality. Appellant's instructions eighteen to twenty three informed the jury what must be proved in order to entitle appellee to recover, and even if it should be conceded that the sixteenth instruction stated a correct rule of law, its substance was covered by those given.

It is next insisted that the damages ~~are~~ as assessed are excessive. If the appellant was guilty of the negligence charged in the declaration, and appellee as a result thereof was required to pay the amounts which the evidence shows she did pay in order to be cured, and she had to endure the pain and suffering which the evidence shows she did endure, and the outside of her face was permanently disfigured, and the operation of her jaws is now limited, we do not think it can be successfully claimed that the judgment is excessive.

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

and no right to disregard his testimony merely from the fact that he
was related by marriage to the appellee. The objection is that it
should not call particular attention to this witness; that his
credibility should be determined by the same standard as is applied
to any other witness; that if this instruction is good, a similar in-
struction would have been given for the mother and sister of appellee
and any other witness. An instruction almost identical with the one
in question was approved in North Chicago Street Railway Company vs.
Illinois, 100 Ill. 272.

The defendant's instruction refused on behalf of appellant, told
the jury that before appellee could recover, she must prove, by ex-
pert evidence of dentists or doctors, that her injury complained of
required from want of ordinary care and skill practiced by reasonable
dentists in that locality. Appellant's instructions
stated that twenty-three informed the jury what must be proved in
order to entitle appellee to recover, and even if it should be con-
sidered that the defendant's instruction stated a correct rule of law,
the evidence was covered by those given.

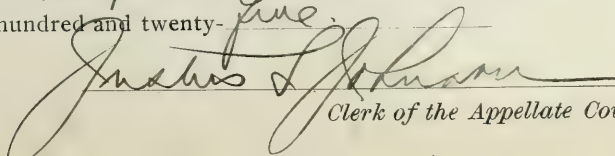
It is next insisted that the damages were so enormous and exorbi-
tant. If the appellant was guilty of the negligence charged in the de-
claration, and appellee as a result thereof was required to pay the
amount which the evidence shows she did pay in order to be cured,
and was left to suffer the pain and suffering which the evidence shows
she did endure, and the outside of her face was permanently disfigured,
and the operation of her jaw is now limited, we do not think it can
be successfully claimed that the judgment is excessive.

So that no reversible error and the judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 28th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five.


Clerk of the Appellate Court.

THE END OF THE WORLD

in my office.

11.

1357
abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 645²

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 3 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

Alfred Totel, appellee,

vs.

Appeal from Circuit Court of

La Salle County

W. C. Vittum, appellant,

238 I.A. 645

Jones, P. J.

This is a proceeding in attachment, in which a jury found the issues in attachment and upon the merits in favor of appellee. A verdict for \$3001.90 was returned. Appellee remitted the sum of \$51.90. Judgment was then entered upon the verdict for \$2950.00 and costs. General and special execution was ordered.

The grounds set up in the affidavit for attachment were (1) that the debt was fraudulently contracted and (2) that appellant was about to conceal, assign or otherwise dispose of his property so as to hinder or delay his creditors. The declaration contained the common counts and two special counts.

Prior to 1912 a plan to construct an electric railroad in La Salle County from Ottawa to Mendota was being promoted. A man by the name of Dodge was then the central figure in the enterprise. A number of persons owning lands in the vicinity of the proposed line were also actively interested. The corporate name of the railroad company was the La Salle County Electric Railroad Company. Considerable progress had been made in acquiring right of way, grading road bed, building culverts and bridges and other necessary work. Certain stock and bonds of the company had been issued. About the date above mentioned, the company encountered serious financial difficulties and Mr. Dodge admitted his inability to carry out the project. The landowners were not willing to abandon the enterprise and began a search for someone to carry it on. Accordingly H. F. Butterfield, one of the landowners, after talking with some of his associates called appellant by long distance telephone from Mendota and asked him for an appointment at his office at Ottawa. The appointment was made. Butterfield, Dodge, and others, thereupon called upon appellant, who had no previous interest in the railroad. They explained briefly to him their

Appeal from Circuit Court of

La Salle County

Alfred T. J. Appel, appellee,

vs.

M. C. Vittum, appellant.

238 I.A. 645

James, F. J.

This is a proceeding in attachment, in which a jury found the issues in attachment and upon the merits in favor of appellee. A verdict for \$3001.90 was returned. Appellee remitted the sum of \$1.90. Judgment was then entered upon the verdict for \$2950.00 and costs. General and special execution was ordered.

The grounds set up in the affidavit for attachment were (1) that the debt was fraudulently contracted and (2) that appellant was about to conceal, assign or otherwise dispose of his property as he might or delay his creditors. The declaration contained the common counts and two special counts.

Erior to 1912 a plan to construct an electric railroad in La Salle County from Ottawa to Mendota was being promoted. A man by the name of Dodge was then the central figure in the enterprise. A number of persons owning lands in the vicinity of the proposed line were also actively interested. The corporate name of the railroad company was the La Salle County Electric Railroad Company. Considerable progress had been made in acquiring right of way, grading road, building trestles and bridges and other necessary work. Certain stock and bonds of the company had been issued. About the date above mentioned, the company encountered serious financial difficulties and T. Dodge admitted his inability to carry out the project. The lands were not willing to abandon the enterprise and began a search for someone to carry it on. Accordingly H. P. Butterfield, one of the defendants, after talking with some of his associates called appellant a long distance telephone from Mendota and asked him for an appointment at his office at Ottawa. The appointment was made. Butterfield

difficulties and asked him to use his best efforts in assisting the farmers along the line in equipping and completing the railroad. The records of the company were placed in his hands and it was revealed through them, as well as from other information received by him, that there was outstanding indebtedness against the company amounting to approximately \$40,000. \$130,000 of bonds had been sold and there was no money in the treasury. Vittum was a real estate man and not a railroad man. He told the men who had come to see him that he knew nothing about railroad building; that the proposition was one of considerable magnitude; and before he would undertake to handle the proposition he must be given sufficient time for investigation. He was acquainted with S. L. Nelson, President of the Peoria City Railway Company, who had been associated with the McKinley system. Vittum went to Peoria to see Nelson and had a conference with him lasting all afternoon. Nelson gave him a letter to the C. F. Child's Bond Company of Chicago. Vittum took the letter and went to the office of said company and was introduced to George W. Sturtevant, its engineer. He talked over the proposition with him, (Sturtevant). They decided that it was necessary to get in touch with a railroad building contractor and accordingly got in contact with the Central Engineering Company and Mr. Sturtevant introduced Vittum to one L.U. Highland, the president of said company. After spending about thirty days' time in investigation and conferences Vittum decided to undertake the completion of the railroad and so notified the landowners.

The financial situation was such that it was necessary to work out a reorganization. A plan was formulated which among other things contemplated the issuance of \$200,000 of 7% cumulative preferred stock. Numerous meetings were held, which were attended by those interested in the project. There were two meetings at Prairie Center, one at the town hall in Wallace Township, two meetings in the courthouse and one meeting at the Woodman Hall in Wallace Township.

The meeting at the last mentioned place was held pursuant to the following notice, called plaintiff's exhibit #3, to-wit:

difficulties and asked him to use his best efforts in assisting the
farmers along the line in acquiring and completing the railroad. The
records of the company were placed in his hands and it was revealed
through them, as well as from other information received by him, that
there was outstanding indebtedness against the company amounting to
approximately \$40,000. \$130,000 of bonds had been sold and there
was no money in the treasury. Vittum was a real estate man and not
a railroad man. He told the man who had come to see him that he knew
nothing about railroad building; that the proposition was one of con-
siderable magnitude; and before he would undertake to handle the pro-
position he must be given sufficient time for investigation. He was
acquainted with S. L. Nelson, President of the Peoria City Railway
Company, who had been associated with the McKinley system. Vittum
went to Peoria to see Nelson and had a conference with him lasting
all afternoon. Nelson gave him a letter to the O. & M. & N. Bond
Company of Chicago. Vittum took the letter and went to the office
of said company and was introduced to George W. Sturtevant, its
manager. He talked over the proposition with him. (Sturtevant).
They decided that it was necessary to get in touch with a railroad
building contractor and accordingly got in contact with the General
Contracting Company and Mr. Sturtevant introduced Vittum to one L. E.
Hendland, the president of said company. After several days' delay
time in investigation and conferences Vittum decided to make
take the completion of the railroad and he called for information.
The financial situation was such that it was necessary to wait
out a reorganization. A plan was formulated which would allow Vittum
to control the issuance of \$200,000 of 7 1/2 percent bonds.
Stockholders meetings were held, which were attended by Vittum,
located in the project. There were no meetings at Peoria during
one at the town hall in Wallace Township, and meetings in the town-
house and one meeting at the Woodman Hall in Wallace Township.
The meeting at the last mentioned place was held pursuant to

"Ottawa, Illinois March 6, 1913.

Mr. Alfred Totel,
Ottawa, Ill.

Dear Sir:

A meeting of all interested in the La Salle County Electric Railroad will be held at Woodman Hall, in Wallace township, on Monday night, March 10th, at 7 o'clock, at which you are earnestly requested to be present. The writer desires to see you in the meantime and give you some details concerning the affairs of the company so that you may be able to inform others whom we may be unable to reach by letter.

The contract for the construction of the road and rolling stock and the placing of the same in operation is already signed, and on Monday next its performance will be guaranteed by a \$100,00 surety bond signed by the New England Casualty company, one of the best guaranty companies in this country. Before the railroad company can comply with its part of the contract it is necessary that one condition be met, viz: The payment of all outstanding bills and obligations already created for work done and materials furnished. And it is now up to the parties already interested in the road, and to be benefited by it, to make the project a success by procuring enough subscriptions to the preferred stock to raise funds to pay the present outstanding claims, which as you know will not be money lost, but simply paying for what is already on the ground, and which could not be reproduced there for less than the amount expended, including these present claims.

Many other matters are to come before the meeting including the selection of names to be voted on for directors of the company. All parties interested should be present at this meeting and get to work, so that final arrangements can be made and work started at once. Don't forget the time and place of the meeting, as your presence and active co-operation can and will do much to make this undertaking a success.

Yours truly,

W. C. Vittum."

Chicago, Illinois, March 6, 1915.

Mr. Alfred Hotel, 1111
Chicago, Ill.

Dear Sir:

A meeting of all interested in the La Salle County Electric
Railroad will be held at Woodman Hall, in Wallace township, on
Monday night, March 15th, at 7 o'clock, at which you are earnestly
requested to be present. The writer desires to see you in the mean-
time and give you some details concerning the affairs of the com-
pany so that you may be able to inform others whom we may be unable
to reach by letter.

The contract for the construction of the road and rolling stock
and the placing of the same in operation is already signed, and on
Friday next its performance will be guaranteed by a \$100,000 surety
bond placed by the New England Guaranty company, one of the best
guaranty companies in this country. Before the railroad company
can comply with its part of the contract it is necessary that one
condition be met, viz: The payment of all outstanding bills and
obligations already created for work done and materials furnished.
And it is now up to the parties already interested in the road, and
to be facilitated by it, to make the project a success by providing
enough subscriptions to the preferred stock to raise funds to pay
the present outstanding claims, which as you know will not be money
lost, but simply be ying for what is already on the ground, and
which could not be repaid there for less than the amount expended,
including these present claims.

Any other matters are to come before the meeting including
the selection of names to be voted on for directors of the company.
All parties interested should be present at this meeting and get to
work so that final arrangements can be made and work started at
once. Don't forget the time and place of the meeting, as your
presence and active co-operation can and will be much to make this

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Exhibit #3 was written at and sent from the office of A.E. Butters, one of the attorneys for appellee, who also acted as attorney for the railroad company and various landowners. He attended the meeting at the Woodman Hall and afterwards signed and became a party to plaintiff's exhibit 4, which we set out in full as follows:

"We, the undersigned owners of lands adjacent to the line of the La Salle County Electric railroad, for the purpose of making it possible for said company to resume operations at once for the completion of said road, and in consideration of the general benefits to be derived by us therefrom, hereby agree to take over forty thousand dollars (\$40,000.00) of the two hundred thousand dollars (\$200,000.00) of 7 per cent. (7 per cent) cumulative preferred capital stock of said company, and to execute therefor our promissory notes for the sum of two thousand dollars (\$2,000.00) each, dated May 1, 1913 and payable May 1, 1914, with interest at 6 per cent. (6 per cent) after November 1, 1913. Certificates for said capital stock shall be issued in sums of one thousand dollars (\$1,000.00), and shall be held for the equal benefit of all of the subscribers when sold. Said promissory notes and the proceeds derived from the sale thereof shall be deposited in a bank to be designated by W. C. Vittum, and the money when paid upon the obligations of said company for labor and material shall be checked out by said Vittum, and later reported to and accounted for to the board of directors of said company.

"Dated at La Salle County, Illinois, April 24, 1913.

| | |
|--------------------|------------------|
| W. C. Vittum, | Alfred Totel, |
| H. F. Butterfield, | Thos. O'Donnell, |
| H. L. Eastegard, | A. E. Butters, |
| Pat. Woods, | A. F. McLachlan, |
| A. O. Kellogg, | Frank Hackman, |
| Achesah E. Luce, | Theron Adair, |
| Henry T. Thorsen, | Wm. Conger, |
| C. F. Battles, | W. J. Willshay, |

Louis Willey,

A. T. Kember,

John A. Wilson,

State of Illinois, County of La Salle, ss.

W. C. Vittum, being first duly sworn according to law, deposes and says that in consideration of the obligations of several subscribers to the annexed paper he will use his best possible endeavors to resell; for the equal benefit of all subscribers, the forty thousand dollars (\$40,000.00) preferred capital stock of the LaSalle County Electric Railroad Company to be taken over by them as in said paper provided.

W. C. Vittum

Subscribed and sworn to before me, this 25th day of April, A. D. 1913.

J. Elbert Keeler,
Notary Public."

(Seal)

Neither of the said exhibits are ambiguous in any respect. They disclose a plain purpose to raise \$40,000.00 with which to pay the outstanding indebtedness against said company to the end that other necessary arrangements for the construction of the road might ultimately be made.

The meeting at the Woodman Hall was numerously attended and was addressed by various persons including Vittum and Butters. The plan for raising the \$40,000. was unanimously agreed upon. After the agreement (plaintiff's exhibit #4) had been signed by those whose names are attached thereto, an effort was made to obtain the notes of the parties. Some were obtained and some were not. Among those obtained was that of appellee. This note was sold and transferred to the First National Bank of Ottawa, together with two other notes, all of which aggregated \$5,000 and after allowing discount thereon, realized \$4862.50. No other moneys were ever obtained through the landowners' notes so given. It appears that the failure to realize upon them was due to the refusal of the banks to discount them. Some of the signers, including Vittum and Butters, did not give their notes,

upon them was due to the refusal of the banks to discount them. Some
local money notes so given. It appears that the failure to realize
realized \$4862.50. No other moneys were ever obtained through the
all of which aggregated \$5,000 and after allowing discount thereon,
to the First National Bank of Ottawa, together with two other notes,
obtained was that of appellee. This note was sold and transferred
of the parties. Some were obtained and some were not. Some of the
names are attached thereto, an effort was made to obtain the notes
agreement (plaintiff's exhibit #4) had been signed by those whose
plan for raising the \$40,000 was unanimously agreed upon. After the
was addressed by various persons including Vittum and Butters. The
The meeting at the Western Hall was adjourned to another day
ultimately be made.
other necessary arrangements for the construction of the road might
the outstanding indebtedness against said company to the end that
They disclose a plain purpose to raise \$40,000.00 with which to pay
Neither of the said exhibits are ambiguous in any respect.
(Seal) Notary Public. J. Elbert Keeler
A. D. 1912. By J. Elbert Keeler, Notary Public.
Subscribed and sworn to before me, this 22nd day of April,
W. O. Vittum
The following is the substance of the deposition of W. O. Vittum
under oath and sworn to before me, this 22nd day of April,
and says that in consideration of the obligations of several sub-
scribers to the annexed paper he will use his best possible endeavor
to resell; for the equal benefit of all subscribers, the forty
thousand dollars (\$40,000.00) preferred capital stock of the Laclede
County Electric Railroad Company to be taken over by them as in said
paper provided.

and according to the undenied testimony of appellant, such omission was due to the fact that Mr. Butters suggested that there was no occasion for the deposit of said two notes. However, they were included in the list of subscribers, and were offered for sale to the banks of Ottawa, Triumph, Troy Grove and Earlville. The proceeds of the notes so sold were applied to the payment of outstanding indebtedness. Inasmuch as said outstanding indebtedness was about \$40,000, 90% of it was left unpaid. The company was never properly financed and construction was not completed. Appellee paid his note after maturity and then brought this suit against appellant.

It is contended by appellee that the whole scheme was a fraud on the part of appellant to obtain appellee's note and to negotiate it; and that the fraud practiced by appellant consisted of material oral and written misrepresentations, (1) as to the existence of a binding contract with a construction company, (2) as to the number of signers the agreement should contain before it would become effective and (3) as to a promise not to negotiate the said note prior to the making of a contract to complete the road.

It is asserted by appellee that at the time plaintiff's exhibit #3 was written, no contract for the construction of the road had been signed and that at the meeting at the Woodmen Hall on March 10, 1913 Vittum orally stated that he had such a contract and that he had in his hand a bond for \$100,000.00 signed by the New England Casualty Company, guaranteeing the performance of the contract, when in fact no such bond had been executed. It is further asserted by appellee that Vittum stated that unless the agreement was signed by twenty men, each of whom would give his note for \$2,000, the agreement would be null and void; that the notes would not be cashed but would be held merely as security; and that he would sell the preferred stock issued to the signers and thus obviate the necessity of ever disposing of the notes.

Nineteen signers and not twenty were obtained and two of them gave their notes for \$1000 each, instead of \$2000. H. F. Butterfield,

and according to the uncontradicted testimony of appellant, when omission was made to the fact that Mr. Butters suggested that there was no occasion for the deposit of said two notes. However, they were included in the list of subscribers, and were offered for sale to the names of Ottawa, Triumph, Troy Grove and Earlville. The proceeds of the notes so sold were applied to the payment of outstanding indebtedness. Inasmuch as said outstanding indebtedness was about \$40,000, 20% of it was left unpaid. The company was never properly liquidated and construction was not completed. Appellee paid his note after maturity and then brought this suit against appellant.

It is contended by appellee that the whole scheme was a fraud on the part of appellant to obtain appellee's note and to negotiate it; and that the fraud practiced by appellant consisted of material oral and written misrepresentations, (1) as to the existence of a binding contract with a construction company, (2) as to the number of shares of stock owned by appellant, and (3) as to the value of the stock owned by appellant. It is further asserted by appellee that at the time plaintiff's exhibit was written, no contract for the construction of the road had been entered into and that at the meeting at the Woodman Hall on March 10, 1912, witness orally stated that he had such a contract and that he had in his hand a bond for \$100,000.00 signed by the New England Guaranty Company, guaranteeing the performance of the contract, when in fact no such bond had been executed. It is further asserted by appellee that witness stated that unless the agreement was signed by twenty men, each of whom would give his note for \$2,000, the agreement would be null and void; that the notes would not be cashed but would be held as security; and that he would sell the stock owned by appellant at the discretion of the company.

Altogether, there were obtained and two of them

who was very active in his efforts to procure the railroad, testified that he informed appellee of this situation at the time the latter gave his note, and that he (Butterfield) agreed that he would make up whatever deficiency there was in the subscriptions and that, with this information, appellee signed the note.

In support of the contention of appellee that the statements attributed to appellant were actually made, testimony was offered tending to show that plaintiff's exhibit #4 was not in the same condition when offered as it was when it was signed, and that when it was being circulated for signatures, it consisted of three sheets of typewritten matter, the first one of which contained a recital of facts similar to those contained in plaintiff's exhibit #3. Appellee testified that he remembered looking it over and what was on the first page was exactly the same as what was on plaintiff's exhibit #3; that the three sheets were fastened together with little brass split tacks and that he stubbed his thumb against one of the tacks. Plaintiff's exhibit 4, as it was offered consists of but two sheets of typewriting with a dark colored paper cover such as is often placed on legal documents. The cover extends over the back of the second sheet and there is a short flap about three-quarters of an inch wide extending over the first page. The manuscript and cover are held together by two rivets in the customary fashion, so that the pages are fastened at points near the top thereof.

Testimony was also offered tending to show that the document when offered was in the same condition it was when it was signed. The trial court certified it to us for our inspection. The cover and the first page, being the page containing the signatures, are soiled and stained and have the appearance of a document which has been circulated and much handled. The cover is wider than the typewritten pages. The instrument shows that it was folded in the ordinary way documents of this character are folded. The edges of the cover at the points where the instrument was folded are perceptibly worn, and the document has the appearance of having been carried in a

who was very active in his efforts to procure the release, testified that he informed appellee of this situation at the time the latter gave him notes, and that he (Butterfield) agreed that he would make up whatever deficiency there was in the original notes. In support of the contention of appellee that the statements attributed to appellee were actually made, testimony was offered tending to show that plaintiff's exhibit 4 was not in the same condition when offered as it was when it was signed, and that when it was being circulated for signatures, it contained at least one of typewritten matter, the first one of which contained a recital of facts similar to those contained in plaintiff's exhibit 4. Appellee testified that he remembered looking at it and that on the first page was exactly the same as what was on plaintiff's exhibit 4; that the three sheets were fastened together with three brass split locks and that he stamped his thumb against one of the locks. Plaintiff's exhibit 4, as it was offered consists of but two sheets of typewriting with a dark colored paper cover such as is often placed on legal documents. The cover extends over the back of the second sheet and there is a slot for about three inches of an inch wide extending over the first page. The manuscript and cover are held together by two rivets in the customary manner, so that the pages are fastened at points near the top corners. Testimony was also offered tending to show that the instrument when offered was in the same condition it was when it was signed. The trial court certified it to us for our inspection. The cover and the first page, being the page containing the signatures, are called and signed and have the appearance of a document which has been circulated and much handled. The cover is wider than the typewritten pages. The instrument shows that it was folded in the ordinary way documents of this character are folded. The edges of the cover at the points where the instrument was folded are damaged.

pocket for a considerable time. The paper of the front page under the flap is white and unstained and the paper below the flap as we have already stated is colored and stained. To us the general appearance of the document furnishes conclusive corroboration of the testimony of the witnesses, who stated that plaintiff's exhibit #4 is now in the same condition that it was when it was signed by the various parties thereto. More than that, we deem the statement that there was an additional page containing the contents of plaintiff's exhibit #3 as altogether improbable. Our further discussion of the case will indicate the reason of our view.

It will be remembered that numerous meetings were held looking toward a plan to rehabilitate the enterprise after the admitted failure of Dodge. The outstanding \$40,000 indebtedness was an ever present obstacle. The danger of suits by creditors was a threatening one; and this was the situation when plaintiff's exhibit #3 was written. The notice does say that a construction contract had already been signed but it does not say that a \$100,000 surety bond had been signed. It states that it would be signed on "Monday next". The statement that the contract had been entered into was of course one as to an existing fact, but the statement that a \$100,000 surety bond would be signed "next Monday" was a statement as to something to be done in the future. The notices contained the ~~salient~~ salient statement that "before the railroad company can comply with its part of the contract it is necessary that one condition be met, viz: The payment of all outstanding bills and obligations already created for work done and materials furnished. And it is now up to the parties already interested in the road and to be benefited by it, to make the project a success by procuring enough subscriptions to the preferred stock to raise funds to pay the present outstanding claims," etc. There can be no concealment of the fact that the object of the meeting was to raise \$40,000 with which to pay the outstanding claims and that the landowners were expected to raise this money.

...for a considerable time. The paper of the front page
under the flap is white and unstained and the paper below the
flap as we have already stated is colored and stained. To us the
general appearance of the document furnishes conclusive corroboration
of the testimony of the witnesses, who stated that plaintiff's
exhibit #4 is now in the same condition that it was when it was
signed by the various parties thereto. More than that, we seen the
statement that there was an additional page containing the contents
of plaintiff's exhibit #8 as altogether impossible. Our further
discussion of the case will indicate the reason of our view.
It will be remembered that numerous meetings were held
looking toward a plan to rehabilitate the enterprise after the
admitted failure of Dodge. The outstanding \$40,000 indebtedness
was an ever present obstacle. The danger of suits by creditors was
a threatening one; and this was the situation when plaintiff's
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contract had already been signed but it does not say that a
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signed on "Monday next". The statement that the contract had
been entered into was of course one as to an existing fact, but the
statement that a \$100,000 surety bond would be signed "next Monday"
was a statement as to something to be done in the future. The
notice contained the material salient statement that "before
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materials furnished. And it is now up to the parties already
interested in the road and to be benefited by it, to make the
project a success by procuring enough subscriptions to the railroad
stock to raise funds to pay the present outstanding claims," etc.
There can be no misconception of the fact that the object of the
meeting was to raise \$40,000 with which to pay the

They were given plainly to understand that unless the money was first raised, nothing further could be done toward the completion of the road.

It is claimed by witnesses for appellee that during the meeting at the Woodman Hall, appellant not only claimed he had a binding contract for the construction of the road, but that he also had with him a surety company bond for \$100,000 guaranteeing the performance of the contract. On the other hand it was testified to by witnesses for appellant that he made no such statement; but that he did have with him and exhibited a surety company bond for \$10,000, which guaranteed that upon the payment of the outstanding indebtedness the surety company would enter into a bond for \$100,000 to guarantee a contract for the completion of the railroad. That appellant ~~had~~ had such a \$10,000 bond is not denied or even questioned and we think there is little doubt that it is the bond which was exhibited at said meeting.

He testified that he had submitted this bond to Mr. Butters before the meeting and that Mr. Butters was at the meeting and heard him speak of such bond. This evidence was not contradicted. The testimony that Vittum exhibited a \$100,000 bond cannot easily be reconciled with the existing facts known to everybody who attended the meeting. Everyone seems to have understood that the object of the meeting was to raise \$40,000 to enable the railroad company to enter into binding engagements for the completion of the road. Therefore testimony that appellant was at a meeting urging the landowners to raise \$40,000 to accomplish a thing which has already been done, is unreasonable.

Just when the agreement was signed by the respective parties is not clear. It bears date April 24, 1913. The last signature must have been affixed sometime after that date. The signers were visited at their various homes and places where they could be found, by appellant, who was generally accompanied by

They were given orally to understand that unless the money was
first raised, nothing further could be done toward the completion
of the road. It is claimed by witnesses for appellant that during the
meeting at the Woodman Hall, appellant not only claimed to have a
binding contract for the construction of the road, but that he
also had with him a survey company bond for \$100,000 guaranteeing
the performance of the contract. On the other hand it was
testified to by witnesses for appellant that he made no such state-
ment; but that he did have with him and exhibited a survey company
bond for \$10,000, which guaranteed that upon the payment of the
outstanding indebtedness the survey company would enter into a
bond for \$100,000 to guarantee a contract for the completion
of the railroad. That appellant himself had secured a \$10,000 bond
is not denied or even questioned and we think there is little
doubt that it is the bond which was exhibited at said meeting.
He testified that he had submitted this bond to Mr. [Name]
before the meeting and that Mr. [Name] was at the meeting and
heard him speak of such bond. This evidence was not contradicted.
The testimony that Vittum exhibited a \$100,000 bond cannot easily
be reconciled with the existing facts known to everybody who
attended the meeting. Everyone seems to have understood that
the object of the meeting was to raise \$40,000 to enable the
railroad company to enter into binding engagements for the
completion of the road. Therefore testimony that appellant was
at a meeting urging the landowners to raise \$40,000 to accomplish
a thing which has already been done, is inconsistent.
Just when the agreement was made by the [Name]
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signatures must have been affixed sometime after that date. The
signers were visited at their various homes and places where they

Butterfield and Pat Woods. The date of appellee's note is May 1, 1913. On the strength of the signed agreement and the execution of various notes, a contract between the railroad company and the Central Engineering Company through the said Highland, as President, was entered into on May 21, 1913. Much stress is laid upon the statement contained in plaintiff's exhibit #3 that a construction contract had already been entered into when in fact it was not executed until the last mentioned date, May 21, 1913 or a little more than three months subsequent to the date of said exhibit. It is urged that such incorrect statement tends at least to show bad faith on the part of ~~the~~ appellant. No very definite explanation is made for such inaccurate statement. Appellant, however, testified that he did not read over the notices after they were written; that they were sent out from the office of Mr. Butters; that at the meeting at the Woodman Hall he explained to all those present that he had made arrangements with a construction company to enter into a contract for the completion of the road and for the giving of a \$100,000 bond to guarantee completion, but that these things were dependent upon the ability of the landowners to first take care of the outstanding indebtedness. He further testified that he stated he had procured a \$10,000 bond to assure the execution of said contract and bond when the outstanding indebtedness had been cared for. The record shows that Thomas O'Donnell, William J. Willshay and Howard Butterfield, all landowners and signers, corroborated appellant in his version of what was said by him at said meeting.

There were several witnesses who testified that nothing was said at the meeting about a \$10,000 bond. Among these who so testified was the said Pat Woods. Yet A.D. Peterson, a court reporter of Chicago, produced his original notes taken on the trial ~~and~~ of the case of Logsdon v. Thomas O'Donnell in Chicago and testified that Woods had sworn that Vittum stated at the Woodman Hall meeting that he then had a \$10,000 bond and would have a \$100,000

Butterfield and Ray Wooten. The date of appeal was made in May 1, 1913. In the absence of the signed agreement and the execution of various notes, a contract between the railroad company and the Central Engineering Company, through the said Highland, as President, was entered into on May 21, 1913. Much stress is laid upon the statement contained in plaintiff's exhibit 45 that a construction contract had already been entered into when in fact it was not executed until the last mentioned date, May 21, 1913 or a little more than three months subsequent to the date of said exhibit. It is urged that such incorrect statement tends to lead to some fact in the past of the appellant. No very definite conclusion is made for such inaccurate statement. Appellant, however, testified that he did not read over the notes after they were written; that they were sent out from the office of Mr. Peterson; that at the meeting at the Western Hotel he explained to the board present that he had made arrangements with a construction company to enter into a contract for the completion of the road and for the giving of a \$100,000 bond to guarantee completion, but that these things were dependent upon the ability of the landowners to first take care of the outstanding indebtedness. He further testified that he stated he had procured a \$10,000 bond to ensure the execution of said contract and bond when the outstanding indebtedness had been paid for. The record shows that Thomas O'Donnell, William J. Wilfong and Howard Butterfield, all landowners and others, corroborated appellant in his version of what was said by him at said meeting.

There were several witnesses who testified that nothing was said at the meeting about a \$10,000 bond. Among these who so testified was the said Ray Wooten. Yet A.D. Peterson, a court reporter of Chicago, produced his original notes taken on the trial of the case of *Logan v. Thomas O'Donnell* in Chicago and

bond executed "if we got this \$40,000 cleaned up".

We are unable to perceive how appellee or anyone else was injured by the alleged misrepresentations of Vittum that he already had a \$100,000 bond and a binding construction contract. In view of the fact that he actually had a \$10,000 bond guaranteeing the execution of both a construction contract and a \$100,000 bond, we are much inclined toward the belief that the recital of what occurred as given by appellant and his witnesses, is more accurate than that given by appellee and his witnesses. But if we were of an ~~opposite~~ opposite view, and were of the opinion that misrepresentations were made, we would, nevertheless, be forced to the conclusion that no one was misled by such statement. There is no possible way to avoid the belief that everyone connected with the transaction knew that whether the contract had been executed or not, it would have no binding force upon anyone until the \$40,000 of existing indebtedness had been gotten out of the way. Plaintiff's exhibit #4 expressly asserts it. The testimony of all the witnesses concede it and the surrounding facts and circumstances prove it.

One rule always adhered to is, that to enable a party to set aside a contract, the representations alleged to be false must be relied upon in entering into the contract. (Hooker v. Midland Steel Co. 215 Ill. 444; Douglas v. Littler 58 Ill. 342.)

It is urged upon us with seeming seriousness by counsel for appellee that the notes were not to be sold, but were to be held in some manner as security for the payment of the outstanding indebtedness and ultimately returned to the makers. We can conceive of no basis for this contention. It is true that the second page of the agreement contained a promise under oath by Vittum that he would "use his best endeavors to resell for the equal benefit of the subscribers" the preferred stock subscribed for by them. He did not agree that he would sell it or that in case of his failure to sell it, he would return the notes. But there is no use to argue this point at any length because ~~if~~ the agreement expressly provided what should be done with the notes;

and executed "if we got this \$20,000 cleared up."

We are unable to perceive how appellee or anyone else

is injured by the alleged misrepresentations of [redacted] that

ready and a \$100,000 bond and a binding construction contract.

view of the fact that he actually had a \$10,000 bond guaranteeing

a completion of both a construction contract and a \$100,000 bond,

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opposite view, and were of the opinion that misrepresentations were

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had been paid out of the way. [redacted] expressly

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copy of the agreement contained a promise under oath by Victim

not to "sell" the notes, but his best endeavors to resell for the equal

value of the "debts" the preferred stock subscribed for by

him. It is not true that he would sell it or that in case of

a failure to sell it, he would "hold" the notes. But there is no

to argue this point at any length because the agreement

it was that the notes and the proceeds derived from the sale thereof should be deposited in a bank by Vittum and the money paid out on the obligations of the company. The evidence shows that the makers knew there was an effort being made to sell their notes soon after they were given. One of counsel for appellee accompanied Vittum to the bank and assisted him in negotiating all of the notes that were sold. He went further than that. Being familiar with the situation as it then existed, he advised appellant concerning the application of the proceeds of the notes to the payment of indebtedness. He even wrote checks in payment of portions of the indebtedness, signed Vittum's name and endorsed upon the back of the check his guarantee of payment. There can be no doubt that everybody at that time was in perfect accord with the purposes of the plan and the methods of carrying it out.

Counsel for appellee give a mistaken interpretation of the effect of the so-called agreement, plaintiff's exhibit #4. They urge upon us that such agreement is a joint agreement. We do not so consider it as far as it related to the individual liability of the signers. The moving consideration was to get promises for the payment of \$40,000. Each person obligated himself to execute his note for \$2000. Certificates of stock were to be executed and held for the equal benefit of all the subscribers when sold. No one was personally liable on the note of any other subscriber. There was no guarantee or promise that all of the makers should prove to be solvent or that their notes could be discounted at a bank. There was not even a promise of delivery of stock to them. The stock according to the agreement was to be pooled and sold, if possible for the common benefit of all of the subscribers. When it came to the execution of ~~his~~ his note, appellee knew that two of the subscribers had given their notes for \$1000 each instead of \$2000 and that there were only nineteen subscribers. Butterfield, who appears from the record, to have been both solvent and responsible,

It was that the notes and the proceeds thereof from the sale of the same should be deposited in a bank by Vittum and the money paid on the obligations of the company. The evidence shows that the makers knew their own effort being made to sell their notes and after they were given. One of counsel for appellee admitted that to the bank and assisted him in negotiating all of the notes that were sold. He went further than that. Being familiar with the situation as it then existed, he advised appellee concerning the application of the proceeds of the notes to the payment of the same. He even wrote checks in payment of portions of the same. Appellee, signed Vittum's name and endorsed upon the back of the notes the guarantee of payment. There can be no doubt that appellee at that time was in perfect record with the purposes of the plan and the whole of carrying it out.

Counsel for appellee give a mistaken interpretation of the text of the so-called agreement, plaintiff's exhibit 44. They say that such agreement is a joint agreement. We do not consider it as far as it related to the individual liability of the makers. The moving consideration was to get promises for a payment of \$40,000. Each person obligated himself to execute a note for \$1000. Certificates of stock were to be issued. A half for the equal benefit of all the contributors was made. One was personally liable to the note at any other time. There was no guarantee or promise that all of the makers should pay to be solvent or that their notes could be discounted at a bank. There was not even a promise of delivery of stock to them. The bank according to the agreement was to be paid for and sold, in whole or in part, the common benefit of all of the contributors. When it came to the execution of the plan, appellee knew that two of the contributors had given their notes for \$1000 each instead of \$100. That there were only nineteen subscribers. Butterfield, who

stated that he would personally make up all deficiency in subscriptions. Appellee having given his note under such circumstances cannot now be heard to complain, even though it was the original understanding that there should be twenty subscribers for \$2000 each.

When appellant received the notes, they were not payable to him. They were payable to the order of the LaSalle County Electric Railroad Company. They were endorsed in blank by the railroad company, per W.D. Weaver, Jr., President. They were sold to the bank and deposited in a special account in the First National Bank of Ottawa and were applied to the payment of outstanding obligations. None of it went to the appellant except certain small items used in defraying his necessary expenses in connection with the enterprise. We have examined the record and there does not appear to be any misappropriation of funds.

Taking the evidence as a whole we are unable to find a single circumstance that indicates a design on the part of appellant to defraud. The enterprise was not his offspring. He was called in to aid it in its extremity, by the men who are now pursuing him. He worked out a plan or reorganization which might have rehabilitated the road, had the landowners been able to carry out their part of the program. Because of their failure to raise \$40,000 the venture failed. Appellant never made a cent out of it. He accounted for all the money he received; he paid it out exactly as he was authorized to do, and now when the promotional venture of appellee and his associates has proven a failure, he seeks to recover his loss from appellant, who never claimed title to the note, nor to any of its proceeds. He was simply an agent vested with power to sell and to disburse the proceeds of the notes.

Appellant testified that at the time the attachment writ was served upon him and a levy made, he owned real estate in the city of Ottawa worth between \$40,000 and \$45,000 above all encumbrances thereon; that he had an equity in Texas property worth from

stated that he would personally make up all deficiencies in
the original understanding that there should be twenty subscribers
for \$1000 each.

When appellant received the notes, they were not payable
to him. They were payable to the order of the Laclede County
Electric Railroad Company. They were endorsed in blank by the
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exactly as he was authorized to do, and now when the promotional
nature of the enterprise and his association has proven a failure, he
seeks to recover his loss from appellant, who never claimed title
to the notes, nor to any of its proceeds. He was simply an agent
vested with power to sell and to disburse the proceeds of the notes.

Appellant testified that at the time the attachment writ
was served upon him and a levy made, he owned real estate in the
city of Ottawa worth between \$40,000 and \$45,000 above all en-

\$20,000 to \$30,000 and that his indebtedness other than mortgage indebtedness did not exceed \$1000.

When and under what circumstances a debtor should be regarded as about fraudulently to dispose of his property so as to authorize an attachment is generally to be determined by the facts in the particular case. As was said by the Supreme Court in *Dubree Watch Case Co. v. Young*, 155 Ill. 226, "If the design had been formed by the debtor, and preparation was being made to carry it out, whether it was to be executed at once, in a day or a week, could make no difference. In either event a creditor would be justified in taking out an attachment." But it cannot be doubted that the design or intent must be proven by direct evidence or by facts and circumstances from which an implication may arise. In this case no effort at all was made to prove such design by direct evidence, but to raise an implication of fraud, there was offered in evidence two deeds conveying a portion of appellant's property. One of the deeds was executed about fifteen months subsequent to the date of the affidavit of attachment and the other approximately two years subsequent thereto. There was also offered in evidence two trust deeds, one of which was for approximately \$6,000 and was executed five months after the execution of the attachment writ. The other trust deed was for \$8,000 and was executed three years before the attachment suit was begun. The evidence does not even tend to show a design to conceal, assign or otherwise dispose of his property in fraud of creditors. (*Dubree Watch Case Co. v. Young*, supra.) It is undenied that appellant, at the time of the trial, was possessed of property of a value largely in excess of his indebtedness including the claim of appellee, and that his home, worth \$7500, was unencumbered.

Because of our views concerning the merits of the case as well as concerning the issue in attachment, this cause must be reversed and remanded, but in order that a second trial may be free from certain errors, which were committed in the last one, we

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...the ...

...and what circumstances a debtor should be

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will briefly comment on such errors. Counsel are always to be permitted to draw reasonable inferences from the evidence and are to be given considerable freedom in argument, but they should never transgress the well established rules of legal ethics by discourteous or disrespectful conduct toward the court, opposing counsel, litigant or witness. The apparently deliberate effort of counsel for appellee to show that Vittum had been indicted by a grand jury and that Highland had been in the penitentiary twice, can only be interpreted as an attempt to inflame the jury against appellant. Highland was not a witness at the trial and Vittum's only acquaintance with him was the direct result of an introduction given by Mr. Sturtevant, of C.F. Child's Bond Company, in consequence of a letter from the President of the Peoria City Railway Company. When counsel will say to opposing counsel "Oh hell, what are you talking about?" and characterize the conduct of opposing counsel with such language as "raring around here like a stud horse in a barn", he ought not to expect a court of justice to sustain a verdict which might possibly be rendered as a result of his misconduct. Courts have repeatedly criticised counsel for making comments upon the answers of witnesses, except in argument before a jury. We hesitate to go through the list of objections made against the conduct of appellee's counsel. It is sufficient to say that we believe each and every one of them is well taken and ~~that~~ that they constituted sufficient ground, without anything else, to have justified the trial court in granting a motion for a new trial. (Parlin & Orendorff Co. v. Scott 137 Ill. App. 454; Eshehman v. Rawalt 298 Ill. 192; People v. Black 317 Ill. 603.)

In view of what we have said about the knowledge possessed by appellee at the time he signed the note in question, his first instruction should not have been given. Appellant's refused instruction No. 19 should have been given. Had it been given there would have been no occasion for the appellant's refused instructions 21, 22 and 23.

[illegible]

Complaint is made by appellant of the failure of the court to give his refused instruction No. 26. This instruction told the jury that if Totel was informed that twenty men had not signed exhibit #4, and that having possession of such information, he executed his note and thereafter informed the First National Bank of Ottawa that said note was a valid note against him and that it might be cashed "then and in such case it will be the duty of the jury to find a verdict for the defendant Vittum."

The language included within the quotation marks makes the instruction a doubtful one. If it had concluded by directing the jury that the failure, under such circumstances, to obtain the signatures of twenty subscribers of \$2000 each would not justify a verdict in favor of plaintiff, it would have been such an instruction as the court should have given under the evidence in this case.

Complaint is also made of the Court's refusal to give a number of other instructions. We think counsel for appellee tendered entirely too many instructions. The substance of many of the refused instructions are contained in other given instructions. The courts of this state have frequently pointed out the impropriety of so many instructions. Substantial accuracy ought not to be expected of a trial judge when he is deluged with a mass of tendered instructions.

For the reasons herein indicated this cause is reversed and remanded.

Reversed and Remanded.

... is made by ... of the ... of the court to ...
... This ... told the ...
... and that having ... of such information, ...
... and thereafter informed the First National Bank ...
... that said note was a valid note against him and that ...
... then and in such case it will be the duty ...
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... It had concluded by ...
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... of twenty subscribers of \$2000 each would not ...
... in favor of plaintiff, it would have been such ...
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... the reasons herein indicated this case is reversed

Reversed and Remanded

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
Sept in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.



J. JUSTUS L.
State of Illinois
being a true copy of the original
as the same is
in the custody of
J. H. O'Connell
Notary Public
for the State of Illinois

7448

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 645³

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 3 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

The People of the State of
Illinois, Defendant in Error,

Error to County
Court of Bureau
County.

v.

Jacob Heitz,
Plaintiff in Error,

238 I.A. 645

Jones P.J.

This is a writ of error by Jacob Heitz, plaintiff in error, to review proceedings in the county court of Bureau County on an information filed in that court on May 8th, 1924 by the State's Attorney against Jacob Heitz, Charles Williams and Barney Williams. The information contained two counts. The first count charged that the defendants, on May 8th, 1924, "at and within said county of Bureau in the state of Illinois did then and there unlawfully transport intoxicating liquor while the said county of Bureau was then and there Prohibition Territory; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois." The second count charged that the defendants, on May 8th, 1924, "at and within the said county of Bureau in the state of Illinois, did then and there unlawfully have and possess intoxicating liquor for the purpose of selling, bartering and furnishing the same in violation of the provisions of an act entitled 'An Act to restrict the manufacture, sale, transportation, possession and use of intoxicating liquor, aiding thereby in establishing uniformity in State and Federal laws in regard thereto,' (in force July 1, 1921), while the said county of Bureau was then and there Prohibition Territory contrary to the statute and against the peace and dignity of the same People of the State of Illinois."

The People of the State of Illinois, Defendant in Error,

Plaintiff in Error,
v.
Jacob Heitz, Plaintiff

v.

Plaintiff in Error,

Page 10.

2381.A. 645

This is a writ of error by Jacob Heitz, plaintiff, to review proceedings in the county court of Bureau County, Illinois, on an information filed in that court on May 8th, 1924, by the State's Attorney against Jacob Heitz, Charles Williams and Barney Williams. The information contained two counts. The first count charged that the defendants, on May 8th, 1924, at and within said county of Bureau in the State of Illinois, did then and there unlawfully transport intoxicating liquor while the said county of Bureau was then and there prohibition territory; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Illinois. The second count charged that the defendants, on May 8th, 1924, "at and within the said county of Bureau in the State of Illinois, did then and there unlawfully have and possess intoxicating liquor for the purpose of selling, bartering and furnishing the same in violation of the provisions of an act entitled 'An Act to restrict the manufacture, sale, transportation, possession and use of intoxicating liquor, aiding thereby in establishing prohibition in State and Federal laws in regard thereto'."

in force July 1, 1921, while the said county of Bureau was then and there prohibition territory contrary to the statute which created the peace and dignity of the State of Illinois.

A nolle prosequi was entered as to Barney Williams, and Charles Williams was admitted to bail without sureties. Plaintiff in error, Jacob Heitz, was tried alone and convicted on both counts. A motion was made to quash the information and each count thereof, which was denied. Such ruling is assigned as error. On the same day that the information was filed, a complaint for a search warrant was made by Carey R. Johnson, as State's Attorney, before the Police Magistrate of the city of Princeton, in the county of Bureau, charging "that he has just and reasonable grounds to believe and does believe that intoxicating liquor is now unlawfully transported and possessed within prohibition territory, to-wit: at and within a certain motor vehicle, to-wit: Dodge touring car operated by one Jacob Heitz on the public highway in the County and State aforesaid, and that the following are the reasons for his belief, to-wit: Reliable information has come to affiant that intoxicating liquor is now being transported in and by said automobile." A search warrant was issued by the police magistrate on the same day to the Sheriff of Bureau County reciting that "Whereas a complaint was this day made in writing, verified by the affidavit of Carey R. Johnson, State's Attorney, for said county of Bureau stating that complainant had just and reasonable grounds to believe and does believe that intoxicating liquor is now unlawfully transported and possessed within prohibition territory, to-wit: 'at and within a certain motor vehicle, to-wit: A Dodge touring car operated by one Jacob Heitz on the public highway, in the County and State aforesaid, and from the facts upon which such belief is based, as set forth in said complaint, the undersigned is satisfied that there is reasonable cause for such belief, we therefore command you in the name of the People of the State of Illinois . . . to forthwith enter the said motor--motor vehicle--above described, etc.'"

The Deputy Sheriff of that county took the search warrant and drove in an automobile to a point about one mile east of the home of the said Barney Williams, which was about three miles northeast of Princeton. There he saw plaintiff in error driving west on the public highway in a Dodge touring car. Charles Williams, one of the other defendants, was with Heitz on the front seat of the Dodge. They drove along the highway until they came to the place of Barney Williams, the other defendant, and there drove into the barnyard. The Deputy Sheriff drove in after them. Plaintiff in error got out of the Dodge car and the Deputy Sheriff began to read the search warrant to him. Heitz told him it was all right to search his car. Charles Williams got out of the car and started toward the house. The Deputy Sheriff called to him to come back and he turned around and walked back to the Dodge car, took something wrapped in newspaper out of his inside pocket, stooped down, and put the package under the front end of the Dodge car on the ground. The Deputy Sheriff went over to the place where Williams had put the package and picked up two bottles of whiskey, or moonshine, wrapped in a newspaper. Williams had on a heavy overcoat. Both bottles were full and neither had been opened. None of the above facts are in dispute. There is some conflict in the evidence as to parts of the conversation between Heitz and the Deputy Sheriff, they being the only witnesses as to the conversation.

Prior to the trial plaintiff in error entered a motion to impound the said two bottles of liquor and not permit the same to be used in evidence against him, charging, among other things, that the complaint and search warrant were illegal and void in not setting forth a sufficiently particular description and designation of the vehicle to be searched, with particulars as to its location sufficient to identify it and in not containing or setting forth facts, showing legal and sufficient reasons for the belief of the person who signed

The Deputy Sheriff of that county took the search warrant and drove in an automobile to a point about one mile east of the home of the said Barney Williams, which was about three miles northeast of the town of Hettie. There he saw plaintiff in error driving west on the highway in a Dodge touring car. Charles Williams, one of the defendants, was with Hettie on the front seat of the Dodge. They drove along the highway until they came to the place of the accident. The other defendant, the other Williams, there drove into the house. The Deputy Sheriff drove in after them. Plaintiff in error got out of the Dodge car and the Deputy Sheriff began to read the search warrant to him. Hettie told him it was all right to search his car. Charles Williams got out of the car and started toward the house. The Deputy Sheriff called to him to come back and he turned around and walked back to the car. He took something wrapped in newspaper out of his pocket, stooped down, and put the package under the front of the Dodge car on the ground. The Deputy Sheriff went over to the place where Williams had put the package and picked up two bottles of whiskey, or moonshine, wrapped in a newspaper. Williams had on a heavy overcoat. Both bottles were still and neither had been opened. None of the above facts are in dispute. There is some conflict in the evidence as to facts of the conversation between Hettie and the Deputy Sheriff, they being the only witnesses as to the conversation. Prior to the trial plaintiff in error entered a motion to require the said two bottles of liquor and not permit them to be used in evidence against him, charging, among other things, that the complaint and search warrant were illegal and void in not setting forth a sufficiently particular description and location of the vehicle to be searched, with reference as to its location within the indictment it was

the complaint that intoxicating liquor was being unlawfully transported and possessed. The application was denied. Upon the trial, plaintiff in error objected to the admission of the bottles in evidence on the ground that they were incompetent and immaterial and had nothing to do with Jacob Heitz. This objection was overruled and at the close of all of the evidence, Heitz renewed his motion made to have the liquor impounded and not used in evidence. The motion was again overruled.

It is contended by plaintiff in error that the motion to quash the information should have been allowed; that the application to exclude the liquor on account of the insufficiency of the search warrant should have been granted; that the verdict is not justified by the evidence; that the verdict of the jury is erroneous in finding plaintiff in error guilty of transporting liquor and also possessing the same liquor at the same time that he was transporting it; and that the court improperly admitted the record of a former conviction of plaintiff in error for a misdemeanor. It is contended by ~~the~~ defendant in error that the plaintiff in error has raised constitutional questions as to the sufficiency of the information, complaint, and search warrant, and that having done so in this court, instead of prosecuting his writ of error to the Supreme Court, he has waived them. The latter question, we shall discuss first. "In order to authorize the Supreme Court to take jurisdiction of an appeal from the circuit court, it must appear from the record, and not merely from the statement of counsel in their briefs and argument, that some question is involved which authorizes the appeal." *People v. Cannon* 236 Ill. 179 (182). None of the assignments of error are in terms upon any constitutional ground and the only reference to a constitutional question by plaintiff in error is in his brief and argument.

...the fact that the liquor was not lawfully
transported and possessed. The application was denied. Upon
the fact, plaintiff in error objected to the admission of
the bottles in evidence on the ground that they were in-
competent and immaterial and had nothing to do with Jacob Heller.
His objection was overruled and at the close of all of the
evidence, Heller renewed his motion made to have the liquor
excluded and not used in evidence. The motion was again
overruled.

The court then said: It is contended by plaintiff in error that the
motion to quash the citation should have been allowed;
and the application to exclude the liquor on account of the
irrelevance of the search warrant should have been granted;
and the verdict is not justified by the evidence; that the
action of the jury is erroneous in finding plaintiff in error
guilty of transporting liquor and also possessing the same liquor
at the same time that he was transporting it; and that the
court improperly admitted the record of a former conviction of
plaintiff in error for a misdemeanor. It is contended further
that the plaintiff in error has raised con-
siderable questions as to the sufficiency of the evidence,
original, and search warrant and that having done so in this
case, instead of prosecuting his writ, he ought to be
allowed to raise them. The latter question, we shall discuss
later. In order to authorize the Supreme Court to take
cognizance of an appeal from the circuit court, it must appear
that the record, and not merely from the statement of counsel in
their briefs and arguments, that some question is involved.

People v. Gannon 250 Ill. 178 (1922).

The mere averment that a constitutional question is involved is of no importance where the record shows that no such question is involved. *People v. Calkins* 291 Ill. 317 (318). Section 118 of the Practice Act provides that writs of error in all criminal cases below the grade of felony shall issue from the Appellate Court, but that in cases in which the validity of a statute or a construction of the constitution is involved, such writs shall issue from the Supreme Court." *People v. Maffei* 315 Ill. 226 (227). In the last case cited three grounds were urged by plaintiff in error: first, that the indictment failed to state an offense under the law and that no sentence could be imposed upon a plea of guilty thereto; second, that although the judgment had been satisfied by the admission of the plaintiff in error to probation and his discharge therefrom, yet it still has force and effect and can be invoked against him, in case he should be charged with a second violation of the law; and third, that section 39 of the Illinois Prohibition Act is unconstitutional. The court held that inasmuch as the record does not show that the third ground was raised in the trial court and no objection or exception preserved, the Supreme Court is without jurisdiction to review the judgment and the cause was transferred to this court, leaving the first two grounds for the consideration of this court, one of which was the sufficiency of the indictment. No question as to the validity of the statute or a construction of the constitution is involved in the instant case. Rather this case is here because it is charged that the information, complaint and search warrant do not comply with the statute. No constitutional question is involved. While the Appellate Court is without jurisdiction to hear and determine constitutional questions, it is equally bound with every other court to observe and regard constitutional rights of a litigant, and a writ of error

... is a constitutional question is involved
... where the record shows that no such question is involved.
People v. O'Neil, 221 Ill. 317 (218).
... provides that writs of error
... shall issue from the Supreme Court.
... but that in cases in which the
... of a statute or a construction of the constitution
... writs shall issue from the Supreme Court.
In the last case cited
... were urged by plaintiff in error; that, that
... failed to state an offense under the law and
... could be imposed upon a plea of guilty thereto
... although the judgment had been satisfied
... of the plaintiff in error to prohibition and
... yet it still has force and effect and
... in case he should be charged
... and third, that section
... is unconstitutional. The
... as the record does not show that the
... was raised in the trial court and no objection or
... the Supreme Court is without jurisdiction
... and the case was transferred to this
... leaving the first two grounds for the consideration of
... which was the sufficiency of the indictment.
... to the validity of the statute or a construction
... is involved in the instant case. Neither
... it is charged that the information
... comply with the statute.
... While the Appellate Court
... determine constitutional
... every other court to observe

from the Supreme Court to the Appellate Court will lie on the ground that it has disregarded or violated constitutional rights. *People v. Powers*, 283 Ill. 438 (440).

The charge in the first count of the information that plaintiff in error did unlawfully transport intoxicating liquor is merely a conclusion of the pleader. This count does not charge any offense in the language of the statute. Only that portion of the statute is used, which refers to transporting ~~xxx~~ intoxicating liquor. The first count does not negative ~~the~~ exceptions in Sec. 3 of the Prohibition Act under which, in certain cases, it would be perfectly lawful for plaintiff in error to have transported intoxicating liquor for non beverage purposes and wines for sacramental purposes, under a permit from the Attorney General. *People v. Barnes* 114 Ill. 140 (140) and cases cited. The first count of the information was insufficient and the second count is equally faulty. The requirements necessary for the sufficiency of indictments and informations have been fully discussed in *People v. Piescz* 226 Ill. App. 363, *People v. Martin* 314 Ill. 110, *People v. Barnes* 314 Ill. 140, *People v. Tate*, 316 Ill. 52, *People v. Elias* ____ Ill. ____, and *People v. Berman* 316 Ill. 547. The second count does not conform to the requirements laid down in *People v. Tate*, *supra*, where the Supreme Court approved a form of indictment as sufficient. Neither ~~is~~ is it sufficient under the holding in *People v. Berman* nor *People v. Elias*, *supra*, and it unnecessary to discuss that count further.

The affidavit for the search warrant being made upon information and belief was also insufficient under *People v. Elias*, *supra*. If the application for the exclusion of the two bottles of liquor had been made by the defendant Barney Williams, there would be no question but that the seizure

From the Supreme Court in the American case, it is clear that the law is not violated constitutionally. The law is not violated constitutionally. The law is not violated constitutionally.

The charge in the first count of the information is that the defendant in error did unlawfully transport intoxicating liquor in violation of the statute. This count does not charge any offense in the language of the statute. Only that portion of the statute is used, which refers to transporting for information. The first count does not

negative the defendant's right to transport liquor for non-beverage purposes and wines for sacramental purposes, under a permit from the Attorney General. People v. [Name], 140 Ill. 140 (1902) and cases cited. The first count of the information was insufficient and the second count is equally faulty. The defendant's motion for a writ of habeas corpus is granted.

People v. [Name], 140 Ill. 140 (1902) and cases cited. The first count of the information was insufficient and the second count is equally faulty. The defendant's motion for a writ of habeas corpus is granted.

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was illegal and that he would have been entitled to have the liquor excluded, under the rule in *People v. Brokamp* 307 Ill. 448; but a nolle prosequi was entered as to him and he is not here complaining of the seizure. The evidence shows, without contradiction, that Charles Williams, a passenger in the car, took the two bottles in question from his pocket and deposited them on the ground on the premises of Barney Williams and that they were ther^e picked up by the Deputy Sheriff. They were not obtained under the search warrant, which directed the search of an automobile, nor obtained from any property of the plaintiff in error, nor from his person, nor by any search at all, but were picked up from the ground where Charles Williams had voluntarily placed them in the presence of the Deputy Sheriff. Although the complaint and search warrant were both insufficient and illegal for the reasons above stated, the court did not err in denying the application to impound the said liquor. As the liquor was not obtained from the automobile of the plaintiff in error, it is unnecessary for us to give our interpretation to *Carroll v. United States* 45 S.C. 280, 67 L. Ed. ___, wherein the right to search an automobile without a warrant is decided.

For the reasons above assigned, the cause is reversed and remanded.

Reversed and Remanded.

... and that he would have been entitled to have the
... under the rule in *People v. Brokamp*, 307 Ill.
... but a wife proceeded was entered as to him and he is not
... the first corner of the indictment
... are containing of the seizure. The evidence shows, without
... in error and voluntarily
... that Charles Williams, a passenger in the car, took
... a possession of the motor.
... the bottles in question from his pocket and deposited them
... in the premises of Barney Williams and that they
... are stored up by the Deputy Sheriff. They were not
... stated that the search warrant, which directed the search of
... a search, was obtained from any property of the plaintiff
... a search, not from this person, nor by any search at all, but were
... located on the ground where Charles Williams had voluntarily
... and then in the presence of the Deputy Sheriff. Although
... a search and search warrant were both insufficient and
... illegal for the reasons above stated, the court did not err
... in denying the application to impound the said liquor. As the
... liquor was not obtained from the automobile of the plaintiff
... a search, it is unnecessary for us to give our interpretation
... *Carroll v. United States*, 260 U.S. 360, 22 S.Ct. 480, 67 L.Ed. 424, wherein
... a search of an automobile without a warrant is decided.
... for the reasons above assigned, the cause is reversed.

Reversed and Remanded.

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

7467 abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 645⁴

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 3 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

1906
JULY 6

T. J. HOH
1810

The People of the State of Illinois,

Defendant in error,

Error to County Court

vs.

of Lake County.

William Farris, Plaintiff in error,

238 I.A. 645

Jones, P.J.

This was a prosecution in the county court of Lake county against the plaintiff in error upon an amended information consisting of two counts, the first count charging the unlawful possession of intoxicating liquor on the 30th day of October, 1924, and the second count charging the unlawful sale of intoxicating liquor on the same date. There was a trial before a jury, which returned a verdict finding the defendant guilty upon the first count. After overruling a motion for a new trial and a motion in arrest of judgment, the court entered judgment on the verdict, sentencing the plaintiff in error to imprisonment in the county jail of Lake county for a period of one hundred days and to pay the costs of prosecution.

A search warrant was issued for the search of a "two story frame house on the west side of the street in Half Day, being the first house north of Hurtell's pavilion controlled by William Farris." It appears from the evidence that this place was the residence of plaintiff in error. On the next lot north of the residence there was a storeroom, which was about thirty-five feet away and not connected therewith. The Sheriff, in company with two of his deputies, went to the latter building and finding the plaintiff in error sitting out in front of the same, began to read the search warrant to him. The two deputies went into the building and plaintiff in error thereupon rushed in after them, seized a bottle, which was standing on a table in the storeroom, and broke it. The contents of the bottle was spilled and the Sheriff soaked some of it up and put it in another bottle. The Sheriff and both of his deputies testified to the finding and seizure on the same occasion of another bottle of intoxicating liquor in the cellar of the premises described in the

The People of the State of Illinois,

Error to County Court

Defendant in error,

of Lake County.

vs.

William Ferris, Plaintiff in error.

238 I.A. 645

Jones, P.J.

This was a prosecution in the county court of Lake county

against the plaintiff in error upon an amended information consist-

ing of two counts, the first count charging the unlawful possession

of intoxicating liquor on the 30th day of October, 1934, and the

second count charging the unlawful sale of intoxicating liquor on

the same date. There was a trial before a jury, which returned a

verdict finding the defendant guilty upon the first count. After

overruling a motion for a new trial and a motion in arrest of judg-

ment, the court entered judgment on the verdict, sentencing the

plaintiff in error to imprisonment in the county jail of Lake county

for a period of one hundred days and to pay the costs of prosecution.

A search warrant was issued for the search of a "two story frame

house on the west side of the street in Half Day, being the first

house north of Hurst's pavilion controlled by William Ferris."

It appears from the evidence that this place was the residence of

plaintiff in error. On the next lot north of the residence there

was a storeroom, which was about thirty-five feet away and not con-

nected therewith. The Sheriff, in company with two of his deputies,

went to the latter building and finding the plaintiff in error sitting

out in front of the same, began to read the search warrant to him.

The two deputies went into the building and plaintiff in error there-

upon reached in after them, seized a bottle, which was standing on a

table in the storeroom, and broke it. The contents of the bottle

was spilled and the Sheriff seized one of it and put it in

another bottle. The Sheriff and both of his deputies testified to

the finding and seizure on the same occasion of another bottle of

search warrant. Plaintiff in error, however, denied that any liquor was so found in the cellar and testified that no liquor was there and that the Sheriff and his deputies never made any claim of such discovery.

Previous to the trial, the plaintiff in error filed a petition for the return of the liquor seized by the Sheriff, in which petition and at the hearing thereon, it was contended by plaintiff in error that absolutely nothing was found in the house described in the search warrant, but that the Sheriff had seized some liquor in another building without warrant and authority of law and intended to use the same in evidence against plaintiff in error on the trial. The court, after a hearing on the petition, refused to impound the liquor. There was admitted in evidence on the trial, the bottle of liquor which the Sheriff and his two deputies testified was obtained by one of the deputies from the cellar of the premises actually described in the search warrant. The liquor that was obtained by the Sheriff in the storeroom from the broken bottle was not admitted in evidence on the trial, an objection thereto by the plaintiff in error being sustained by the court; but the Sheriff was permitted over the objection of plaintiff in error, to testify that it was "intoxicating moonshine whiskey". A motion was made by plaintiff in error to strike out this testimony but the motion was denied by the court.

Although the court refused to permit the liquor that was obtained from the bottle that was broken by plaintiff in error to be introduced in evidence, the following instruction offered by defendant in error was given: "The court instructs you in the language of the statute that if any fluid in or about any place for the search of which a warrant has been issued or is about to be issued, be poured out or otherwise destroyed, at the time or before the place is searched, manifestly for the purpose of preventing its seizure, such pouring or destruction shall be prima facie evidence that such fluid was intoxicating liquor and was then and there kept or transported in violation of this Act." The refusal of the court to admit in evidence the liquor obtained by the Sheriff from the broken bottle was proper

search warrant. Plaintiff in error, however, denied that any liquor was so found in the cellar and testified that no liquor was there and that the Sheriff and his deputies never went any place of such character.

Previous to the trial, the plaintiff in error filed a petition for the return of the liquor seized by the Sheriff, in which petition and at the hearing thereon, it was contended by plaintiff in error that absolutely nothing was found in the house described in the search warrant, but that the Sheriff had seized some liquor in another building without warrant and authority of law and intended to use the same in evidence against plaintiff in error on the trial. The court, after a hearing on the petition, refused to impound the liquor. There was admitted in evidence on the trial, the bottle of liquor which the Sheriff and his two deputies testified was obtained by one of the deputies from the cellar of the premises actually described in the search warrant. The liquor that was obtained by the Sheriff in the storeroom from the broken bottle was not admitted in evidence on the trial, an objection thereto by the plaintiff in error being sustained by the court; but the Sheriff was permitted over the objection of plaintiff in error, to testify that it was "intoxicating something whiskey". A motion was made by plaintiff in error to strike out this testimony but the motion was denied by the court.

Although the court refused to permit the liquor that was obtained from the bottle that was broken by plaintiff in error to be introduced in evidence, the following instruction offered by defendant in error was given: "The court instructs you in the language of the statute that if any fluid in or about any place for the search of which a warrant has been issued or is about to be issued, be poured out or otherwise destroyed, at the time or before the place is searched, manifestly for the purpose of preventing its seizure, such pouring or destruction shall be prima facie evidence that such fluid was intoxicating liquor and was then and there kept or transported in violation of this act." The refusal of the court to admit in evidence

because of the fact that it was taken from plaintiff in error's place of business, while the search warrant described only his residence. (People v. Castree, 311 Ill. 392.) The admission of the testimony by the Sheriff that the liquor obtained by him from the broken bottle was "intoxicating moonshine whiskey" was but another way of proving what the liquor itself would have proved if admitted in evidence. In People v. Castree, supra, on page 395, it is said that the action of the court, in denying the motions of the plaintiff in error "and admitting the evidence of the officers as to the result of their search raises the principal question in the case, which is, is evidence obtained by an unreasonable search conducted by officers of the State admissible on the trial of the owner of the premises searched on a criminal charge, upon the ground that it was obtained in violation of his constitutional right?" In People v. Bishop, 225 Ill. App. 610 (624) this court said "Without the improper introduction in open court of # # # the inadmissible testimony of the witnesses who participated in the search and seizure, there is no evidence in the record," etc. In both of these cases it was held that evidence obtained by an unlawful search was inadmissible, and we think it is clear that the courts are committed to the doctrine that where the liquor itself is inadmissible, because of an illegal search and seizure, evidence of its intoxicating quality is also ~~admis~~ inadmissible. To hold that this evidence of the Sheriff, as to the intoxicating character of the liquor in the broken bottle seized by him without warrant, was admissible, would be to hold that while the physical property obtained in an illegal raid cannot be used in evidence, yet the State may use evidence of the contraband character of the property secured in such an illegal raid, against the defendant with the same effect as if the property itself were used in evidence. The effect of such a holding would be to nullify the rights guaranteed by the constitution and to legalize illegal searches. Constitutional rights cannot be deprived of their legal force and efficacy by subterfuge. They are substantial rights concerning which no shift or device can be employed to evade the full protection

...of the fact that it was taken from defendant in error's place
of business, while the search warrant described only his residence.
(People v. Gastner, 311 Ill. 392.) The admission of the testimony
by the Sheriff that the liquor obtained by him from the broken bottle
was "interesting mechanical evidence" was but another way of proving
what the liquor itself would have proved if admitted in evidence.
In People v. Gastner, supra, on page 392, it is said that the
of the court, in deciding the motion of the defendant in error to
admit the evidence of the officers as to the result of their
search raised the principal question in the case, which is, in
evidence obtained by an unlawful search is inadmissible as evidence
of the state attributable to the fact of the error of the officers
attached on a criminal charge, upon the ground that it was obtained
in violation of his constitutional right? In People v. Bishop, 225
Ill. App. 610 (224), this court said "Without the improper introduction
in an open court of $\frac{1}{2}$ the inadmissible testimony of the witness
as the participated in the search and seizure, there is no evidence
in the record," etc. In both of these cases it was held that evi-
dence obtained by an unlawful search was inadmissible, and we think
it is clear that the courts are committed to the same rule.
The liquor itself is inadmissible, because of an illegal search and
seizure, evidence of its intoxicating quality is also inadmissible.
We hold that this evidence of the Sheriff, as to the intoxi-
cating character of the liquor in the broken bottle seized by him
without warrant, was inadmissible, would be to hold that while the
physical property obtained in an illegal raid cannot be used in
evidence, yet the state may use evidence of the contraband character
of the property secured in such an illegal raid, against the defend-
ant with the same effect as if the property itself were used in evi-
dence. The effect of such a ruling would be to nullify the right
guaranteed by the constitution and by legislative enactments.
Constitutional rights cannot be deprived of their legal force and
effect by such a ruling. They are substantial rights concerning which

guaranteed by the letter and spirit of the constitution. The evidence of the Sheriff that the liquor obtained from the broken bottle was "intoxicating moonshine whiskey" was highly prejudicial to the rights of plaintiff in error and its admission was error.

The liquor obtained through the illegal seizure not being in evidence and the testimony of the Sheriff as to its intoxicating character not being competent, there was nothing in the record on which to base the giving of the instruction above set forth. The case went to the jury upon the disputed evidence concerning the bottle of liquor which the officers claimed was found in the basement of the building described in the search warrant, and the incompetent testimony of the Sheriff as to the intoxicating character of the liquor poured out of the broken bottle. The instruction told the jury such pouring or destruction was prima facie evidence that such fluid was intoxicating liquor and was then and there kept or transported in violation of the Act. It could have no other effect than to greatly prejudice the rights and interests of plaintiff in error. In this state of the record, it was clearly reversible error to give it. The instruction was erroneous for another reason. It purports to be in the language of the statute, which refers to liquor "in or about any place for the search of which a warrant has been issued or is about to be issued," and there is no pretense that the liquor taken from the broken bottle in the storeroom was in or about any place for the search of which a warrant had been or was about to be issued.

Both plaintiff in error and defendant in error discussed fully the question of whether the Prohibition Act repealed the Search and Seizure Act, citing authorities, but it is not necessary in this case for us to decide that question.

Because of the errors in admitting the testimony of the Sheriff as to the intoxicating character of the liquor obtained from the broken bottle, and the giving of the instruction above quoted, the judgment of conviction is reversed and the cause remanded.

Reversed and Remanded.

of the fact that it was found in the broken bottle

guaranteed by the letter and spirit of the constitution. The evi-
dence of the Sheriff that the liquor obtained from the broken bottle
was "intoxicating moonshine whiskey" was highly prejudicial to the
rights of plaintiff in error and its admission was error.
The liquor obtained through the illegal seizure not being in
evidence and the testimony of the Sheriff as to its intoxicating
character not being competent, there was nothing in the record on
which to base the giving of the instruction above set forth. The
case went to the jury upon the disputed evidence concerning the
bottle of liquor which the officers claimed was found in the posses-
sion of the building described in the search warrant, and the in-
competent testimony of the Sheriff as to the intoxicating character
of the liquor poured out of the broken bottle. The instruction told
the jury such pouring or destruction was prime facie evidence that
such kind was intoxicating liquor and was then and there found or
transported in violation of the Act. It could have no other effect
than to greatly prejudice the rights and interests of plaintiff in
error. In this state of the record, it was clearly reversible error
to give it. The instruction was erroneous for another reason. It
purports to be in the language of the statute, which refers to liquor
"in or about any place for the search of which a warrant has been
issued or is about to be issued," and there is no pretense that the
liquor taken from the broken bottle in the storeroom was in or about
any place for the search of which a warrant had been or was about to
be issued.
Both plaintiff in error and defendant in error claimed that
the question of whether the Prohibition Act repealed the Search and
Seizure Act, giving authorities, but it is not necessary in this case
for us to decide that question.
Records of the error in admitting the testimony of the Sheriff
as to the intoxicating character of the liquor obtained from the
broken bottle, and the giving of the instruction above quoted, the

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

2
J. JUSTUS L. JOHNSON
State of Illinois and receiver
for the copy of the contract

I do hereby
at Ottawa, Ill.
the 10th day of Jan.

7472 abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 645⁵

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 3 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

APRIL 17

THE

JOHN A. BROWN, President
JOHN A. BROWN, A. BARTLOW, Treasurer

the opinion of the
the opinion of the

James A. Rourke,

appellant,

Appeal from Circuit Court

vs.

of Winnebago County.

Harrison Fossler,

appellee.

238 I.A. 645

Jones, P. J.

This is an appeal from a decree of the circuit court of Winnebago County, wherein appellant filed his bill against appellee to establish a mechanic's lien in the amount of \$227.92, for labor and materials furnished under a contract between him and appellee for the construction of a concrete driveway with retaining walls, on the premises of appellee in the City of Rockford. There was a hearing before the chancellor and the bill was dismissed for want of equity and this appeal followed.

The evidence shows that the house where appellee lived stood on the east side of and considerably above the street. He desired to build a concrete driveway on the south side of his house, extending from the street to a place where he intended to build a garage. There were to be concrete curbs or retaining walls on the sides of the driveway. Excavation was necessary for that purpose. Appellant was employed to do the concrete work. The contract was oral and there is considerable dispute about its terms. Appellee contends that the roadway was to be seven feet wide in the clear between the retaining walls; that the south line of the south wall was to be on the south line of his property; that the top of the north wall from the west side of the porch toward the east was to be on a level with the top of a sidewalk on the south side of his house; that the work done is crooked and the driveway less than seven feet wide; that the south wall is not on the south line of his property; that a portion of the east end of it is over on his neighbor's lot, that the west end of the wall is three inches north from the property line; and that the work was not done in a workmanlike manner.

James A. Bourke,

Appellant,

Appeal from Circuit Court

vs.

of Winnebago County.

Harrison Foster,

Appellee.

238 I.A. 645

Jones, P. J.

This is an appeal from a decree of the circuit court of

Winnebago County, wherein appellant filed his bill against appellee

to establish a mechanic's lien in the amount of \$227.92, for labor

and materials furnished under a contract between him and appellee

for the construction of a concrete driveway with retaining walls,

on the premises of appellee in the City of Rockford. There was a

hearing before the chancellor and the bill was dismissed for want

of equity and this appeal followed.

The evidence shows that the house where appellee lived stood

on the east side of and considerably above the street. He desired

to build a concrete driveway on the south side of his house, extend-

ing from the street to a place where he intended to build a garage.

There were to be concrete curbs or retaining walls on the sides of

the driveway. Excavation was necessary for that purpose. Appellant

was employed to do the concrete work. The contract was oral and

there is considerable dispute about its terms. Appellee contends

that the roadway was to be seven feet wide in the clear between

the retaining walls; that the south line of the south wall was to

be on the south line of his property; that the top of the north

wall from the west side of the yard toward the east was to be on

a level with the top of a sidewalk on the north side of his house;

that the work done is correct and the driveway four feet seven feet

wide; that the south wall is not on the south line of his property;

that a portion of the east end of it is over on his neighbor's lot,

that the west end of the wall is three inches north from the property

line; and that the north wall was not done in a satisfactory manner.

Appellee made no complaint until about four days after the wall had been constructed and the forms removed. But when appellant's workmen came to plaster the walls and finish them, appellee claimed the walls had not been put in as agreed and refused to allow the work to proceed. Appellant caused a letter to be written by his attorneys to appellee to which the attorneys who were then acting for appellee replied, assigning seven reasons why the work was not according to contract. The fourth reason assigned was as follows:- "The south retaining wall was to be built adjacent to the adjoining property. It was built from two to three inches away which therefore, undoubtedly, accounts for the driveway not being seven feet wide and makes that particular strip of land of no value to Mr. Fessler." Another objection mentioned in the letter was, that the north wall, beyond the terrace, was to be level with the walk running to the back porch, and that it was at least six inches lower than the sidewalk. This letter was written June 11th, so that appellee had then had several days in which to examine the work. When this suit was brought and another attorney represented him, he assigned different reasons for avoiding the contract.

A man by the name of Holcomb was employed and paid by appellee to do the excavating. Appellee claimed on direct examination that he had nothing to do with the excavation other than to hire Holcomb. On cross-examination, he admitted he made his own contract with Holcomb and told him just what to do. After Holcomb had finished his work, appellee and his son-in-law widened the excavation and on the south side dug down against the property line stake at the southwest corner.

There is nothing in the record to show that appellant had anything to do with directing the work of excavation, and Holcomb testified appellant gave him no directions. It is also undisputed that appellant began work on the 18th day of May, 1923, which was Friday, and the excavated part of the south wall was poured Saturday forenoon. The north wall was not poured until the 21st, which was Monday. Appellee, by his own testimony, came home Friday, between 4:30 o'clock and 5:00 o'clock and he says that the form for the south wall was then in and

Appellee made no complaint until about two days after the
wall had been constructed and the fence removed. But when appellee's
workmen came to replace the wall and fence line, appellee claimed
the wall had not been put in as agreed and refused to allow the work
to proceed. Appellant caused a letter to be written by his attorneys
to appellee to which the attorneys who were then acting for appellee
replied, assigning seven reasons why the work was not according to
contract. The fourth reason assigned was as follows: "The south re-
taining wall was to be built adjacent to the adjoining property. It
was built from two to three inches away from the property line,
accounting for the driveway not being wider than the wall and
retaining strip of land of no value to Mr. Tinsler." Another object-
ion mentioned in the letter was, that the north wall, beyond the
driveway, was to be level with the walk running to the back porch, and
that it was at least six inches lower than the sidewalk. This letter
was written June 15th, so that appellee had then had several days
in which to examine the work. When this suit was brought and another
attorney represented him, he assigned different reasons for avoiding
the contract.

A man by the name of Holcomb was employed and paid by appellee to
do the excavating. Appellee claimed on first examination that he had
nothing to do with the excavation other than to hire Holcomb. On cross-
examination, he admitted he made his own contract with Holcomb and
told him just what to do. After Holcomb had finished his work,
and his son-in-law widened the excavation and set the wall at the
corner against the property line stake at the southwest corner.

There is nothing in the record to show that appellee had anything
to do with directing the work of excavation, and Holcomb testified
appellee gave him no directions. It is also undisputed that appellee
began work on the 11th day of May, 1925, which was Friday, and the ex-
cavated part of the south wall was poured Saturday forenoon. The north
wall was not poured until the 21st, which was Monday. Appellee, by
his own testimony, came back Friday, between 4:30 o'clock and 5:00

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they had poured the east end, a part of which appears to be above ground, and that they poured the west end the next day. He had ample opportunity to observe how the form was set for the west part of the south wall before it was poured, and being a contractor himself, he could hardly have failed to see that condition. He had equal opportunity to observe that the east end of the wall was too far south, if that be true, but he made no complaint about that until the hearing of this cause.

He now claims the north wall is not against the bank of the excavation and that on that account the driveway is too narrow, but he also had opportunity to see how the form for the north wall was set. It is admitted that appellee was at home when the north wall was built, although he claims he was confined to the house with a lame foot. Other witnesses say he was out where the work was being done. At any rate his daughter, who was acting for him, was there a part of the time and they knew what was going on. When he made his complaint by letter, his thought evidently was that he had lost three inches of ground south of the driveway and he made no complaint about the north wall. In constructing the walls, if a form was used between the wall and the bank of the excavation, the wall would not be against the bank when the form was removed; if no form was used there, the poured concrete would settle against the bank and there would be no space between the wall and the bank. If forms were so used appellee had the opportunity to see how they were set. If no forms were used, which the evidence tends to show, each wall must have been against the bank and appellee could not complain for he prepared the width of the excavation. ~~In view of the circumstances appellee is in no position to complain for he prepared the width of the excavation.~~ In view of the circumstances appellee is in no position to complain about the location of the walls.

The testimony tends to show that the tops of the walls are a little more than an inch less than seven feet apart. There is a conflict in the testimony as to whether they were to be seven feet apart. But even if it were established that they were to be of that width, such a small deviation in the width of a driveway is not of enough consequence

They had poured the earth and, a part of which appeared to be above ground, and that they poured the rest and the next day. He had ample opportunity to observe how the form was set for the west part of the south wall below it was poured, and being a contractor himself, he could hardly have failed to see that condition. He had equal opportunity to observe that the west end of the wall was too far north, if that be true, but he made no complaint about that until the pouring of this course.

As now claims the north wall is not against the back of the excavation and that on that account the driveway is too narrow, but he also had opportunity to see how the form for the north wall was set. It is admitted that appellee was at home when the north wall was built, although he claims he was confined to the house with a lame foot. Other witnesses say he was not where the work was being done. It may be that he was sitting for him, was there a part of the time and they claim that was going on. When he made his complaint by letter, his thought evidently was that he had lost three inches of ground north of the driveway and he was complaining about the north wall. In constructing the walls, if a form was used between the wall and the back of the excavation, the wall would not be against the beam when the form was removed; if no form was used there, the poured concrete would settle against the beam and there would be no space between the wall and the beam. If forms were on west appellee had the opportunity to see how they were set. If no form were used, still the evidence tends to show, each wall must have been against the beam and appellee could not complain but he persisted in the view of the excavation. ~~It is not the right of the appellant to have the driveway widened.~~ It is no position to complain about the location of the walls. The testimony tends to show that the view of the walls was a little more than an inch less than that shown. There is a conflict in the testimony as to whether they were to be seven feet apart. But even if it were established that they were to be of that width, such

to require a contractor to tear out the walls and replace them as demanded by appellee. Some consideration must be given to the use for which the walls were designed. If the project was something which required minute exactness in dimension, a different rule might apply, but in an ordinary driveway no such exactness is required, and it would be grossly inequitable to require the contractor to go ~~the~~ to the expense of tearing out and replacing two concrete walls to remedy so inconsequential a deviation.

The evidence shows that at the bottom of the walls they are at least six feet, nine inches apart. Even if it be conceded that they were to be seven feet apart, the evidence is that appellee directed or at least assented, that the forms be drawn in at the bottom so as to give the walls a slope for protection in case of frost and that they were so drawn in an inch or an inch and a half on each form.

By appellee's own testimony coal trucks have been using the driveway and there is nothing in the record to show that it is not just as serviceable as if it were full seven feet wide. Appellee claims that the north wall from the west side of the porch toward the east was to be on a level with the sidewalk, along the south side of his house. At least three witnesses testified that appellee directed the setting of the stakes for the height of the north wall and that the stakes were changed at his direction. He denies that he gave any such direction or directed the setting of the stakes. Even if he did not so direct the setting of these stakes, he had ample opportunity to see them and could have ordered them changed, if he desired to do so. His first contention was that the wall is six inches too low. His answer alleges it is three inches too low and now he claims it is too high at one place and from an inch and a half to two inches too low at another.

The evidence shows that the driveway was excavated by appellee's servant, under his direction, and that appellee afterward made some change in it; that the walls were put in substantially on the lines of the excavation made by appellee and in substantial compliance with the contract between appellee and appellant; that appellee has by his conduct estopped himself to deny that he approved the acts now complained

to require a contractor to tear out the walls and replace them as shown
by appellee. Some consideration must be given to the cost of such
the walls were designed. If the project was actually a project
in its existence in dimension, a different rule might apply, but in an
ordinary driveway no such existence is required, and it would be grossly
inequitable to require the contractor to go him to the expense of tear-
ing out and replacing two concrete walls to remedy an inconsequential
deviation.

The evidence shows that at the bottom of the walls they are at least
six feet, nine inches apart. Even if it be conceded that they were to
be seven feet apart, the evidence is that appellee directed or at least
suggested, that the forms be drawn in at the bottom so as to give the
walls a slope for protection in case of frost and that they were so
drawn in an inch or an inch and a half on each form.

By appellee's own testimony coal trucks have been using the drive-
way and there is nothing in the record to show that it is not just as
serviceable as if it were full seven feet wide. Appellee claims that
the north wall from the west side of the house toward the south wall
is on a level with the sidewalk, along the south side of his house. It
is at least three witness testified that appellee directed the setting of
the stakes for the height of the north wall and that the stakes were
set at his direction. He denies that he gave any such direction
or directed the setting of the stakes. Even if he did not so direct
the setting of these stakes, he has no responsibility for the fact that
they have ordered them changed, if he desired to do so. His
contention was that the wall is six inches too low. His answer appellee
is that three inches too low and now he claims it is too high at one place
and from an inch and a half to two inches too low at another.

The evidence shows that the driveway was constructed by appellee's
servant, under his direction, and that appellee afterward made some
change in it; that the walls were put in substantially on the lines of
the construction made by appellee and in substantial compliance with the
contract between appellee and appellant; that appellee did not direct

of. We are of the opinion that the work was done substantially according to contract and in a workmanlike manner. But if the work in some minor particulars has not been done as it should have been done, appellee would be entitled to some deduction.

We are of the opinion that the chancellor was in error in dismissing the bill. The decree of the circuit court will be reversed and the cause remanded with directions to enter a decree as prayed in the bill so far as the same is sustained on proof of quantum meruit.

Reversed and Remanded with Directions.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS
The State of Illinois, and

Testimony

*Rehearing denied October 6, 1925-
Abstract only.*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 646

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 8 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

2

A TERM OF THE APPELLATE COURT,

1888

TWO

1888

1888

Kate Williams, Appellee,

v/

Fernandus Jacobs, Appellant,

Appeal from City Court
of Sterling, Whiteside
County, Illinois

238 I.A. 646

Jones P.J:

Kate Williams, plaintiff and appellee, instituted this suit against Frank Heflebower and Fernandus Jacobs to recover on a certain promissory note for the principal sum of \$3700, dated March 7, 1913, and payable two years after date with interest at the rate of six per cent per annum. Heflebower was the principal maker and Jacobs was a surety. Jacobs, only, was served with summons. He filed two pleas. The first plea averred that the plaintiff grossly neglected and refused to collect the money from the principal who was solvent long after the maturity of the note, but who is now insolvent, and that by reason of neglect of the plaintiff in collecting from Heflebower, the defendant has become deprived of his indemnity. The second plea avers that plaintiff, for a valuable consideration of one per cent a year on the principal of the said note, agreed with said Heflebower to postpone the time of payment of said note and that said time of payment was so extended, without the knowledge or consent of the surety, and that the note had several times since its maturity been extended by agreement between the said plaintiff and said Heflebower without the knowledge or consent of Jacobs.

The evidence shows that the plaintiff is a widow, living at Polo, Illinois, and that for a long time had been well acquainted with Heflebower and had considerable confidence in him. Heflebower made application to her for a loan. The money of Mrs. Williams was in the hands of Robert L. Bracken, one of her attorneys in this case.

Appeal from City Court
of Sterling, Whiteside
County, Illinois

242 .A.1 882

Kate Williams, Plaintiff and appellee, instituted this
 suit against Frank Hellebaker and Ferdinand Jacobs to recover on
 certain promissory note for the principal sum of \$2000, dated
 June 7, 1912, and payable two years after date with interest
 at the rate of six per cent per annum. Hellebaker was the principal
 debtor and Jacobs was a surety. Jacobs, only, was served with
 process. He filed two pleas. The first plea averred that the
 plaintiff grossly neglected and refused to collect the money
 due the principal who was solvent long after the maturity of the
 note, but who is now insolvent, and that by reason of neglect of
 the plaintiff in collecting from Hellebaker, the defendant has
 been deprived of his indemnity. The second plea avers that plain-
 tiff, for a valuable consideration at one time made a loan to
 defendant of the said note, agreed with said Hellebaker to post-
 pone the time of payment of said note and that said time of payment
 was so extended, without the knowledge or consent of the surety,
 that the surety has never been able to collect from the
 principal by agreement between the said plaintiff and said Hellebaker
 without the knowledge or consent of Jacobs.

The evidence shows that the plaintiff is a widow, living
 at Chicago, Illinois, and that for a long time had been well
 acquainted with Hellebaker and his family. It is
 Hellebaker made application to her for a loan. The money of the
 loan was in the hands of Robert L. Braeken, one of her attorneys

The evidence shows that the plaintiff is a widow, living

William was in the hands of Robert L. Brecken, one of her attorneys. William made application to her for a loan. The money of Mrs.

Heflebower and Jacobs executed the note and turned it over to Bracken, who retained custody of it for a number of years thereafter. Interest was paid to Mrs. Williams and whatever credits appear on the note were placed there by her. She and Heflebower had a conversation shortly after the maturity of the note, in which she told him that he could keep the money as long as he paid the interest. In 1916 the interest was paid sometime after it was due. In 1917 Mrs. Williams was complaining that her income was not sufficient to live on and that she could not meet her current expenses. Sometime during that year Heflebower made two payments of \$175 each, or a total of \$350. He testified that he was not owing interest in that amount at the time he made the second payment. In addition to the \$3700 note sued on, he also owed her, on another note, the sum of \$300. The latter note is not involved in this case. He further testified that the money he so paid in excess of interest then due was "applied as interest" and to the following leading question propounded to him by his counsel, to-wit: "And the second \$175 would be on advanced interest, would it?", he replied, "Yes".

In the next year, 1918, he paid a year's interest. In 1919 Mrs. Williams again complained of her financial distress and when Heflebower paid the year's interest, he told her he would allow her 7% interest instead of 6%, and he accordingly did so. He continued to pay 7% interest up to and including 1923. He testified that he told Mrs. Williams he would pay her 7% and that extra \$40 would help on the coal bill; that he wanted to keep the money; and if she were willing for him to do so he would be glad to pay her 7% interest.

Mrs. Williams, in her testimony, denied that she ever had any conversation with Heflebower concerning the payment of interest in advance, and also denied that he ever said to her that he would pay her 7% interest provided she was willing to let him keep the money.

William and Jacob executed the note and turned it over to
William, who retained custody of it for a number of years there-
after. Interest was paid to Mrs. Williams and was always credited
to her on the note. The note was placed in her hands by her. In
a conversation shortly after the maturity of the note, in
1918 she told him that he could keep the money as long as he paid
the interest. In 1918 the interest was paid sometime after it
was due. In 1919 Mrs. Williams was complaining that her income was
not sufficient to live on and that she could not make her payments
any longer. Sometime during that year William made two payments
of \$100 each, or a total of \$200. He testified that he was not
paying interest in that amount at the time he made the second payment.
In addition to the \$200 note used on, he also used her, on another
note, the sum of \$300. The latter note is not involved in this case.
He further testified that the money he paid in 1919 was for
interest then due was "applied as interest" and to the following
question proposed to him by his counsel, to-wit: "And
the second \$100 would be an advanced interest, would it?" he
replied, "Yes".
In the next year, 1918, he paid a year's interest. In
1919 Mrs. Williams again complained of her financial distress and
William paid the year's interest, he told her he would
allow her 1/2 interest instead of 6%, and he accordingly did so.
He continued to pay 1/2 interest up to and including 1923. He
testified that he told Mrs. Williams he would pay her 1/2 and that
she would help on the coal bill; that he wanted to keep
the money, and if she were willing for him to do so he would be
willing to pay her 1/2 interest. That was
Mrs. Williams, in her testimony, denied that she ever had
any conversation with William concerning the payment of interest
thereafter, and also denied that he ever said to her that he would
pay her 1/2 interest if she would help him to do so.

She admitted the two \$175 payments in 1917, but denied that she credited any part of such payments as advance interest. She kept no books. She had no bank account and she used the money she received as it came in. When she wanted to endorse a credit upon the note, she would go to her attorney's office to do so. She said that sometimes he was not in when she went there, and the credits could not be made. No credits were placed on the note from March 1st, 1917 to September 1, 1923. However, it is not claimed by appellant that any more interest was paid than is endorsed on the note.

The evidence in this case is not sufficient to support the first plea. The appellee was not bound to bring suit on the note any sooner than she did. The surety gave her no notice to sue, as he had a right to do under the statute, and is in no position to complain of appellee because she did not sooner institute proceedings. (Wurster et al, v. Albrecht, et al, decided by this court as Gen. No. 7418 but not yet published.) It is not clear that any interest was actually paid in advance. It is true that \$350 was paid sometime after March, in 1917. Heflebower states that it was advance interest and was credited as such, but he details no conversation from which the jury or the court can say his conclusion is correct. He repeats nothing said by Mrs. Williams. He admits his own recollection concerning the conversation is vague, and he makes no definite claim as to the exact sum of advance interest actually paid or the period of time it was to cover. The fact that he continued to pay interest annually thereafter would indicate that nothing was applied as ^{advance} interest in 1917. The necessities of Mrs. Williams were such as might be expected to induce Heflebower to make as large payments upon the note as he possibly could.

Payment of interest in advance without the knowledge or approval of a surety will not operate as a discharge of a surety, unless ~~there~~ there was a binding agreement between the holder of the note and the principal maker, for a definite extension of time. It is true that the payment of advance interest is a sufficient consideration to support a binding agreement to extend the time of payment, but

the appellee the two \$100 payments in 1917, but denied that she
received any part of such payments as advance interest. She kept
a book. She had a bank account and she used the money she
received as it came in. When she wanted to endorse a credit
on the note, she would go to her attorney's office to do so. She
said that sometimes he was not in when she went there, and the
credit could not be made. No credits were made on the note from
March 1st, 1917 to September 1, 1922. However, it is not claimed
that any more interest was paid than is endorsed on
the note.

The evidence in this case is not sufficient to support the
first plea. The appellee was not bound to bring suit on the note
any sooner than she did. The surety gave her no notice to sue, as
she had a right to do under the statute, and is in no position to
maintain an appeal because she did not sooner institute pro-
cess. (Hester v. Hester, 21, v. Hester, et al., decided by this
court on Dec. 12, 1918 but not yet published.) It is not clear
that any interest was actually paid in advance. It is true that
\$100 was paid sometime after March, in 1917. Nevertheless
it was advance interest and was credited as such, but no
credit or conversation from which the jury or the court can say
a conclusion is correct. He repeats nothing said by Mrs. Williams.
He admits his own recollection concerning the conversation is vague,
and he makes no definite claim as to the exact sum of advance
interest actually paid or the period of time it was to cover. The
fact that he continued to pay interest annually thereafter would
indicate that nothing was applied as interest in 1917. The necessities
of Mrs. Williams were such as might be expected to induce Hester
to make as large payments upon the note as he possibly could.
Payment of interest in advance without the knowledge or
approval of a surety will not operate as a discharge of a surety.
There was a binding agreement between the holder of the note
and the principal debtor, for a certain period of time, to

such payment is only prima facie evidenced of such an agreement and may be rebutted by proof. In the present case, we think the jury was warranted in concluding from the evidence that neither party understood that the debtor was bound to keep the loan for any fixed and definite term, nor that the creditor was bound to forbearance for the same period of time. An agreement to result in a binding contract, must be certain as to its terms and for a definite period. One of the leading cases in Illinois on this subject is *English v. Landon*, 181 Ill. 614. In that case Sandidge borrowed a certain sum of money from Cooper, and gave his note with Landon as surety. The evidence in the case showed that Cooper wanted the maker to keep the money for a longer period of time and told the maker that he could do so for another year and need pay but 7% interest instead of 8% as called for by the note. The Supreme Court in commenting upon such evidence said: "Unless, however, both parties are bound by the contract of extension there is no consideration for the agreement of the creditor to extend the time of payment. There is no evidence in this record showing such an extension of time for a specified period and for a specified consideration as was mutually binding on both parties. There is in this record no evidence which would preclude the creditor from bringing suit at any time on the note and having a recovery, by reason of anything shown in the way of an extension of time for a consideration." The promise of Mrs. Williams to let Heflebower keep the money as long as he paid the interest, was too indefinite to constitute a binding agreement or to legally prevent her from bringing suit on the note, whenever she might wish to do so.

The fact that Heflebower paid 7% interest the last few years before suit was brought has little, if any, legal significance. When he paid such rate, the interest had already accrued. If it suited him to pay 7% interest instead of 6% interest, the contract as expressed by the note was not altered in any way, nor the position of the parties changed in any respect. He was not

which payment is only prima facie evidence of such an agreement
and may be rebutted by proof. In the present case, we think the
evidence was sufficient to establish from the evidence that neither
party understood that the debtor was bound to keep the loan for any
fixed and definite term, nor that the creditor was bound to
reimburse for the same period of time. An agreement to result
in a binding contract, must be certain as to its terms and for a
definite period. One of the leading cases in Illinois on this
subject is *English v. Landon*, 181 Ill. 614. In that case Landon
advanced a certain sum of money from Cooper, and gave him a note with
the evidence in the case showed that Cooper
wished the money to keep the money for a longer period of time
and told the maker that he could do so for another year and need
pay but 4% interest instead of 8% as called for by the note.
The Supreme Court in commenting upon such evidence said: "Unless,
however, both parties are bound by the contract of extension there
is no consideration for the agreement of the creditor to extend the
time of payment. There is no evidence in this record showing such
an extension of time for a specified period and for a specified
consideration as was mutually binding on both parties. There is
in this record no evidence which would preclude the creditor from
extinguishing itself at any time on the note and having a recovery, by
reason of anything shown in the way of an extension of time for a
"consideration." The promise of Mrs. Williams to let Hellebaker
keep the money as long as he paid the interest, was too indefinite
to constitute a binding agreement or to legally prevent her from
extinguishing itself on the note, whenever she might wish to do so.
The fact that Hellebaker paid 4% interest the last few
years before suit was brought has little, if any, legal sig-
nificance. When he paid such rate, the interest had already accrued.
It is called him to pay 4% interest instead of 8% interest, the
contract as expressed by the note was not altered in any way, nor
the position of the parties changed in any respect. He was not

compelled to do it, because of any agreement he had made. He had entered into no ~~for~~ enforceable contract to pay it. Such payment was simply a voluntary act on his part. "A mere promise of indulgence on payment of interest at the rate named in the note or any other rate is not binding without something to bind the debtor to pay interest for a given time." (Crossman v. Wohleben 90 Ill. 537.) A payment of interest in advance would answer if it were accompanied by a promise of the principal debtor to keep the money a given time and by a promise from the holder of the note to extend the payment for that time. It is essential in all cases that both parties should be bound by the agreement and that such agreement should have mutuality. The record in this case is barren of any evidence tending to show that Mrs. Williams bound herself, by word or act not to bring suit at any time she might desire. There had been no payment of interest for any specified time in the future. There was no definite time fixed after the maturity of the note when payment could be demanded. The whole situation is lacking in every element of definiteness necessary to a binding agreement for an extension of time. The holder of the note was at liberty to sue whenever she felt like it. If, under the facts and circumstances of this case, it appeared that Hefelbower had at any time paid more than the amount of accrued interest, the excess could have been allowed as a credit upon the principal. No contention is made that the aggregate amount of interest paid exceeded the amount endorsed on the note.

In support of the proposition that to release a surety, the extension of time must be upon a new and valid consideration and that it is essential for the agreement to be such that neither the debtor can compel the creditor to accept the payment of the debt nor the creditor to enforce payment thereof before the agreed time has expired, we cite Harrison v. Thackaberry 154 Ill. App. 246; Moyses v. Schendorf 238 Ill. 232; and Hyland Park State Bank v. Sheahan 149 Ill. App. 225.

...to do so, because of any agreement to that effect. The
 ...and entered into no enforceable contract to pay it. Such pay-
 ...and was simply a voluntary act on his part. "A note payable at
 ...on payment of interest at the rate named in the note
 ...or any other rate is not binding without something to bind the
 ...to pay interest for a given time." (Graham v. Whitehead
 ...of the 11th. 1887.) A payment of interest in advance would amount to
 ...were accompanied by a promise of the principal debtor to keep
 ...the money a given time and by a promise from the holder of the
 ...note to attend the payment for that time. It is essential in
 ...all cases that both parties should be bound by the agreement and
 ...that such agreement should have mutualty. The record in this case
 ...a burden of any evidence tending to show that Mrs. William Young
 ...herself, by word or act not to bring suit at any time and might
 ...there. There had been no payment of interest for any specified
 ...time in the future. There was no definite time fixed after the
 ...maturity of the note when payment could be demanded. The whole
 ...transaction is lacking in every element of definiteness necessary
 ...to a binding agreement for an extension of time. The holder of
 ...the note was at liberty to sue whenever she felt like it. It
 ...under the facts and circumstances of this case, it appears
 ...that Whitehead had at any time paid more than the amount of
 ...accrued interest, the excess could have been allowed as a credit
 ...upon the principal. No contention is made that the agreement
 ...amount of interest paid exceeded the amount endorsed on the note.
 ...In support of the proposition that to release a surety,
 ...an extension of time must be given a new and valid consideration
 ...and that it is essential for the agreement to be such that neither
 ...the creditor nor the debtor is bound to accept the payment of the
 ...note and the creditor is entitled to enforce payment thereof and should
 ...time and agreed, as also William v. Thompson, 111 Ill. 187, 1881
 ...Graham v. Whitehead, 111 Ill. 188, and Whitehead v. Young, 111 Ill. 189, 1881.

6.

Both parties to the alleged agreement were witnesses upon the trial and gave their respective versions of the case. The jury accepted the version of appellee and we think justly so. The judgment of the trial court is therefore affirmed.

Judgment Affirmed.

Both parties to the alleged agreement were witnesses
and the trial was held before a jury of twelve men.
The jury returned a verdict of guilty and we think fairly so.
The judgment of the trial court is therefore affirmed.

REMARKS BY THE COURT.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

THE LIFE OF
THOMAS JEFFERSON
BY
JAMES MONTGOMERY FLAHERTY
- a true copy of the -

7504

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 646²

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 12 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

A TERM OF THE APPELLATE COURT

L. JONH

R. E. J. J. J. J.

J. J. J. J. J.

J. J. J. J. J.
J. J. J. J. J.
J. J. J. J. J.

A. W. Peterson,

appellant,

vs.

Appeal from Winnebago

Circuit Court.

A. E. Freburg,

appellee.

238 I.A. 646

Jett, J.

On February 26, 1921, appellee subscribed for one hundred shares of the capital stock of the Sheet Steel Products Company at \$100.00 per share and in part payment therefor executed five promissory notes each for the sum of \$1000.00 dated March 1, 1921, and maturing respectively on the first day of July, August, September, October and November following. These notes not having been paid, appellant instituted suit to recover thereon.

The declaration consists of the common counts and a special count in which it is averred that each of said notes had been assigned to him for full value before maturity and without notice of any defenses thereto and that he was the legal owner and holder thereof. To the declaration the defendant pleaded the general issue and two special pleas. In the special pleas the defendant stated that the notes were executed by him to the Sheet Steel Products Company in part payment of the purchase price of one hundred shares of the capital stock of that Company; that appellant was a Director in said Company and that this stock was subject to the provisions of the Blue-Sky law and was a Class D security and sold by the company in violation of the provisions of that law; that at the time appellee purchased the stock it was represented to him by the officers and agents of said company that the company was legally organized; that One Hundred Thousand Dollars of the capital stock of the corporation had been paid into the corporation in cash; that the stock was worth \$100.00 per share and that the corporation was financially sound; that all these representations were false and untrue and that the stock was of little or no value and that the corporation was actually indebted in the sum of Fifty

A. W. Peterson,

Appellant from Minneapolis

Appellant,

Circuit Court.

vs.

A. E. Peterson,

Appellee.

238 I.A. 640

1. 1.

On February 26, 1921, appellee subscribed for one hundred shares of the capital stock of the Sheet Steel Products Company at \$100.00 per share and in part payment therefor executed five promissory notes each for the sum of \$1000.00 dated March 1, 1921, and maturing respectively on the first day of July, August, September, October and November following. These notes not having been paid, appellant instituted suit to recover thereon.

The declaration consists of the common counts and a special count in which it is averred that each of said notes has been assigned to him for full value before maturity and without notice of any assignment thereto and that he was the legal owner and holder thereof. To the declaration the defendant pleaded the general issue and two special pleas. In the special pleas the defendant stated that the notes were executed by him to the Sheet Steel Products Company in part payment of the purchase price of one hundred shares of the capital stock of that company; that appellant was a director in said company and that this stock was subject to the provisions of the Blue-Sky law and was a class B security and sold by the company in violation of the provisions of that law; that at the time appellee purchased the stock it was represented to him by the officers and agents of said company that the company was legally organized; that one hundred thousand dollars of the capital stock of the corporation had been paid into the corporation in cash; that the stock was worth \$100.00 per share and that the corporation was financially sound; that all these representations

Thousand Dollars above the amount of its capital stock actually paid in; that it was unable to pay its obligations, was insolvent at the time appellee purchased this stock and had continued so to be and had lost its property because of its inability to pay its debts, all of which facts appellant well knew at the time of the assignment to him of the notes sued on. Upon these pleas issues were joined and upon a trial before the court, a jury having been waived, judgment was rendered in bar of the action and in favor of appellee for costs, from which judgment appellant has prosecuted this appeal.

The evidence discloses that R. D. Chappell, David Pizer and Walter H. Hendrickson were the original incorporators of this company and it was by them certified to the Secretary of State that One Hundred Thousand Dollars of the capital stock had been subscribed and that amount paid in cash. The first meeting of the stockholders was held on December 16, 1920, and at that meeting appellant was elected one of the Directors of the company and subsequently on June 7, 1921 was chosen President and was so serving at the time of this hearing. He attended the meetings of the officers and was an active participant in the affairs of the company. At the time the company was organized not one dollar was paid into the company for stock and according to its records only \$18,500.00 was ever paid in and this was collected by assessment of the several stockholders to whom stock had been sold after the charter had issued. A factory site and machinery had been purchased at a cost aggregating \$64,600.00, and salaries to the general manager, secretary and treasurer had been voted by the directors but only small payments had been made upon the factory site and its equipment, and at the time appellee executed these notes to the company it was without funds to carry on its business. On April 5, 1921 the Board of Directors, appellant being present, authorized the secretary and treasurer of the company to raise funds from the sale of these notes and on April 22, 1921, appellant purchased these notes of the company paying full value therefor and they were duly assigned by the secretary of the company and delivered to him and the proceeds deposited to the credit of the

The amount of the capital stock actually paid
 is that it was unable to pay its obligations, was insolvent at the
 time appellee purchased this stock and had continued so to be and
 had lost its property because of its inability to pay its debts, and
 of which facts appellant well knew at the time of the purchase of
 him of the notes and on. Upon these facts were joined and
 upon a trial before the court, a jury verdict was returned
 was rendered in part of the action and in favor of appellee for costs,
 from which judgment appellant has presented this appeal.
 The evidence discloses that E. D. Campbell, David L. Lusk and
 Walter E. Kendrick were the original incorporators of this company
 and it was by their articles of incorporation that the company was
 organized. The amount of the capital stock had been subscribed
 and that amount paid in cash. The first meeting of the stockholders
 was held on December 16, 1920, and at that meeting appellant was
 elected one of the directors of the company and subsequently on June
 5, 1921 was chosen President and was so serving at the time of this
 hearing. He attended the meetings of the officers and was an active
 participant in the affairs of the company. At the time the company
 was organized not one dollar was paid into the company for stock and
 according to its records only \$18,500.00 was ever paid in and this
 was collected by announcement of the several stockholders to whom stock
 had been sold after the charter had issued. A factory site and
 machinery had been purchased at a cost aggregating \$64,600.00, and
 salaries for the general manager, secretary and treasurer had been
 voted by the directors but only small payments had been made upon
 the factory site and its equipment, and at the time appellee exorci-
 ed these notes to the company it was without funds to carry on its
 business. On April 5, 1921 the Board of Directors, appellant being
 present, authorized the secretary and treasurer of the company to
 raise loans from the sale of these notes and on April 22, 1921,
 appellant purchased these notes of the company paying full value

company. The evidence further discloses that one of the conditions for the purchase of the stock by appellee was that he, appellee, would be elected a director of the company and on April 21, 1922, this was done but appellee testified that he never attended any of the meetings of the directors and that shortly after the execution of the notes he learned of the condition of the company and demanded the return of his notes.

It further appears that after the institution of this suit appellant brought suit against the said Pizer, Chappell and Hendrickson to recover damages which he alleged he had sustained by reason of their false and fraudulent representations in connection with their relation to the Sheet Steel Products Company and in his declaration referred to this instant case and alleged among other things that the defendants in that proceeding had certified to the Secretary of State that the Sheet Steel Products Company was incorporated for \$100,000.00 which was fully paid but which statement was untrue and false; that the company never procured a license to sell its stock and did not comply with the Illinois Securities Law but if it had its stock would have come within the provisions of the law relating to Class D securities. He further alleged that the company was not able to meet its obligations and outstanding debts or able to pay any part thereof but was wholly insolvent.

It is the contention of appellant that appellee purchased this stock from Pizer and that it was an individual transaction with him and not the stock of the company which appellee purchased. This contention is not sustained by the evidence. Pizer was the treasurer of the company. The contract for the purchase of the stock was directed to the corporation and by the corporation accepted. The notes executed by appellee in payment therefor were made to the company and by the company held until indorsed and transferred by the secretary of the company for the corporation and the consideration paid by appellant for these notes was placed to the credit of the company. No certificate of stock was ever issued as the agreement therefor provided that the balance of the purchase price was to be

company. The evidence further discloses that at the time of the purchase of the stock by appellee was that he, appellee, was elected a director of the company and on April 21, 1922, this was done but appellee testified that he never attended any of the meetings of the directors and that shortly after the execution of the notes he learned of the condition of the company and demanded the return of his notes.

It further appears that after the institution of this suit appellee brought suit against the said Riser, Chapell and Hendrickson to recover damages which he alleged he was entitled to receive as a result of false and fraudulent representations in connection with their relation to the Sheet Steel Products Company and in his declaration referred to this instant case and alleged among other things that the defendant in this proceeding had certified to the Secretary of State that the Sheet Steel Products Company was incorporated in Illinois, which was a false statement and which statement was untrue and false; that the company never received a license to sell its stock and did not comply with the Illinois Securities Law of 1917 and that it was in violation of the law relating to the registration of securities. He further alleged that the company was not able to meet its obligations and outstanding debts or able to pay any part thereof and was wholly insolvent.

It is the contention of appellant that appellee purchased this stock from Riser and that it was an individual transaction with him and not the stock of the company which appellee purchased. This contention is not sustained by the evidence. Riser was the treasurer of the company. The contract for the purchase of the stock was entered into by the corporation and by the corporation accepted. The notes executed by appellee in payment therefor were made to the company and by the company held until indorsed and transferred by the Secretary of the company for the corporation and the corporation paid by check for these notes and the proceeds of the sale of the stock were used as the payment.

made upon the call of the company therefor after November 1, 1921 and that the certificate would issue only when fully paid for. Under these and the other facts appearing in this record it cannot be seriously contended that this was not a sale by the corporation of its stock and the provisions of the Blue Sky Law admittedly not having been complied with there can be no recovery by appellant unless we hold that notwithstanding his relationship as an officer and director of the company he is in truth and in fact a bona fide holder of these notes for value.

By reason of the statute the powers and government of a corporation are exercised by its Board of Directors. Under the facts as disclosed by this record appellant was a member of the Board of Directors of the Sheet Steel Products Company and actively participated in the management of its affairs from its inception, attended the meetings of the Board and voted upon questions affecting its interests and we are of the opinion he is chargeable with knowledge of everything it was his duty to know concerning commercial paper belonging to the corporation which the company undertook to sell. *Hardin v. Dale*, (Okla.) 146 Pac. 717,; L.R.A. 1915 D, 1099; *McCartney v. Keprata*, 48 L.R.A. (N.S.) 71; *Corpus Juris* 14 A. page 100; *Moody v. Chicago Title & Trust Co.*, 126 Ill. App. 68-74. Section 37 of the Illinois Securities Law of 1919, which was in force and effect at the time of this transaction provided among other things that "every sale and contract of sale, made in violation of any of the provisions of this Act shall be void". In *McGregor v. Lamont*, 225 Ill. App. 451, it was held that this provision did not render a note, given for the purchase of corporate stock which was sold in violation of this act void if it was in the hands of a bona fide holder for value. In our opinion appellant did not take these notes as an innocent purchaser. He took them with full knowledge of their defects. No other conclusion in our judgment can be reached from the evidence. It will be remembered that this cause was tried by the court without the intervention of a jury. He saw the witnesses and heard them testify and was therefore in a position to judge of

made upon the call of the company treasurer after December 1, 1911
and that the certificate was issued only after the call was made.
There was no other factor appearing in this record it cannot be
rationally explained that this was not a sale by the corporation of
its stock and the provisions of the Blue Sky law admittedly not
having been complied with there can be no recovery by applicant
unless we hold that notwithstanding the relationship as an officer
and director of the company he is in truth and in fact a bona fide
holder of these notes for value.
My reason of the state of the law and the provisions of a com-
pensation are exercised by the Board of Directors. Under the facts
as disclosed by this record applicant was a member of the Board of
Directors of the Great Steel Products Company and actively partici-
pated in the management of its affairs from its inception, and
of the meeting of the Board and voted upon questions affecting the
interests and was one of the signers of the certificate of its knowledge
of everything it was his duty to know concerning the company's
affairs. To the certificate which the company treasurer is well
known to have signed, (Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 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2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192,

their credibility and of the weight that should be accorded their testimony. Certainly it cannot be said that the finding of the court was manifestly against the weight of the evidence.

The judgment of the trial court was correct and it will be affirmed.

Judgment Affirmed.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

• *Journal of the American Medical Association*, 1997; 277: 1021-1025

• 360172 3-60172

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

CHINSON, JR.
keeper of the No.
true copy of the opinion of the
office
I herewith certify that

1511

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 646³

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 12 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

OFFICE OF THE ATTORNEY

HON. NORMAN L. JONES
FACULTY
M. JETT
CHINSE
SHORE

MEMBERED, 19

Rose Smith,

appellant,

Appeal from the Circuit Court

vs.

of Peoria County.

William Trager,

appellee.

238 I.A. 646

Jett, J.

Upon the trial of this case in the Circuit Court of Peoria County, the jury returned a verdict in favor of the defendant upon which, after overruling a motion for a new trial, judgment was rendered and an appeal has been prosecuted to this court.

The action was brought for the recovery of damages for personal injuries received by Rose Smith, appellant, on October 13, 1923, when she was struck by an automobile operated by William Trager, appellee, upon a public street in the City of Peoria.

The declaration consists of four counts all of which averred that the plaintiff, while in the exercise of due care and caution for her own safety was struck by the car of the defendant while he was driving his car in a northerly direction on Bridge Street and the intersection of Bridge Street and South Adams Street. The first count charged general negligence in the operation of the car. The second charged the defendant with negligently failing to properly apply his brakes and bring his car to a stop before it struck the plaintiff. The third charged the defendant with failing to keep a proper lookout for objects and persons in the highway and the fourth count averred that at the time of the accident there was in full force and effect in the City of Peoria an ordinance which provided that a vehicle crossing from one side of the street to the other should, in so doing, keep to the right and alleged the duty of the defendant in crossing from one side of South Adams Street to the other, to keep to the right and averred the breach of that duty and a failure to observe the provisions of said ordinance.

James Smith,

Appellant from the Circuit Court

Appellant,

vs.

vs.

William Trager,

Appellee.

238 I.A. 646

1931, 1.

Upon the trial of this case in the Circuit Court of Peoria County the jury returned a verdict in favor of the defendant upon which, after overruling a motion for a new trial, judgment was rendered and an appeal has been presented to this court.

The action was brought in the Circuit Court of Peoria County, Illinois, received by Rose Smith, appellant, on October 10, 1928, when she was struck by an automobile operated by William Trager, appellee, upon a public street in the City of Peoria.

The declaration consists of two counts all of which aver that the plaintiff, while in the exercise of due care and caution for her own safety was struck by the car of the defendant while he was driving his car in a northerly direction on Bridge Street and the intersection of Bridge Street and South Adams Street. The first count charged general negligence in the operation of the car. The second charged the defendant with negligently failing to properly apply his brakes and bring his car to a stop before it struck the plaintiff. The third charged the defendant with failing to keep a proper lookout for objects and persons in the highway and the fourth charged that at the time of the accident there was in full force and effect in the City of Peoria an ordinance which provided that a vehicle approaching from one side of the street to the other should, in so doing, keep to the right and alleged the duty of the defendant in approaching from one side of South Adams Street to the other, to

The evidence disclosed that Adams Street runs in a northeasterly and southwesterly direction. It was intersected at an angle by Franklin Street which runs north and south and by Bridge Street which runs in a northwesterly direction. The west side of Franklin Street is somewhat northwest of the northeasterly side of Bridge Street. The accident happened between four thirty and five o'clock in the afternoon. A traffic officer was stationed in Adams Street at this intersection, it being a busy corner and the traffic ordinance, the provisions of which appellant insists were violated, was offered and admitted in evidence without objection. Appellee had driven in a northwesterly direction up Bridge Street and was driving across Adams Street intending to go up Franklin Street when his car struck appellant, as a result of which she suffered a compound fracture of both bones of her right leg and was otherwise permanently and severely injured. The evidence as to the position of appellant when she started to cross Adams Street, as to the direction she took in crossing, the place where she was at the time she was struck and as to the position of the traffic officer is conflicting. It is the contention of appellant that she was standing on the northeasterly side of Bridge Street at the corner where it intersects Adams Street, and with her daughter and a friend was intending to go to the Globe Grocery Store which is on the opposite side of Adams Street; that her daughter and friend were walking together and she was two or three feet behind them; that they proceeded to cross Adams Street in a straight line west in obedience to the directions of the traffic officer on a well defined cross-walk, and had reached a point about halfway between the northwest curb corner of Franklin and Adams Streets and the farthest west rail of the street car tracks when she was struck from behind by the left front wheel of the car driven by appellee. Had Bridge Street continued across Adams Street in a straight line then according to the evidence produced on behalf of appellant the traffic officer was standing in the center of Adams Street at a point which would be about even with the northwest side of Bridge

Street. Appellant also contends that appellee drove his car up Bridge Street into Adams Street toward where the traffic officer was standing, handed an apple to the traffic officer and that the place where appellant was struck was slightly northwest of the place where the traffic officer stood.

Appellee insists that he was coming up Bridge Street intending to proceed across Adams Street and into Franklin Street, that he had stopped his car at the intersection of Bridge and Adams in order to permit the traffic to pass up and down on Adams; that upon signal from the traffic officer he started his car in second speed and was proceeding slowly, three or four miles per hour, and that his car was at the right of the center of Franklin Street at all times after it entered Adams Street; that the position of the traffic officer was northwest of the place indicated by the testimony of the witnesses for appellant; that appellant had left the curb at a point northwest of the place indicated by her and that she was "jay-walking" through the traffic across Adams Street arm in arm with her companions and on no cross-walk; that appellee stopped his car to avoid hitting her and after she had passed in front of his car he started up and she stepped back in front of his car and was struck.

The negligence of which appellant complains in the fourth count of her declaration is in respect to the place where appellee was driving his car just before and at the time she was injured. She insists that appellee was driving his car at a place where, under the provisions of the ordinance he had no right to be. Although the ordinance declared upon provides that " a vehicle crossing from one side of the street to the other shall in doing so keep to the right" the court, at the request of appellee, gave to the jury the following instruction, viz:-

"The court instructs the jury that even though they may believe from the evidence, that at the time of the occurrence in question the automobile of the defendant was being operated on the left-hand side of the street, such fact alone (if defendant is operating car with due care and caution) is not sufficient to charge the defendant with negligence. The operator of said automobile had the right to use any part of such street, subject only to the rights of other people thereon. You are to consider all

street. Appellee also contends that appellee drove his car up
Bridge Street into Adams Street toward where the traffic officer
was standing, handed an apple to the traffic officer and that the
place where appellee was struck was slightly northwest of the place
where the traffic officer stood.

Appellee insists that he was coming up Bridge Street intending
to proceed across Adams Street and into Franklin Street, that he had
stopped his car at the intersection of Bridge and Adams in order to
permit the traffic to pass up and down on Adams; that upon signal
from the traffic officer he started his car in second speed and was
proceeding slowly, three or four miles per hour, and that his car
was at the right of the center of Franklin Street at all times after
it entered Adams Street; that the position of the traffic officer
was northwest of the place indicated by the testimony of the witnesses
for appellee; that appellee had left the curb at a point northwest
of the place indicated by her and that she was "jay-walking" through
the traffic across Adams Street arm in arm with her companions and
on a cross-walk; that appellee stopped his car to avoid hitting her
and after she had passed in front of his car he started up and she
stepped back in front of his car and was struck.

The negligence of which appellee complains in the fourth count
of her declaration is in respect to the place where appellee was
driving his car just before and at the time she was injured. She
insists that appellee was driving his car at a place where, under
the provisions of the ordinance he had no right to be. Although the
ordinance declared upon provides that "a vehicle crossing from one
side of the street to the other shall in doing so keep to the right"
the court, at the request of appellee, gave to the jury the following

instruction, viz:-

"The court instructs the jury that even though they
may believe from the evidence that at the time of the
accident in question the automobile of the defendant was
being operated on the left-hand side of the street, such
fact alone will not entitle the defendant to a verdict
and caution is not sufficient to charge the defendant
with a violation of the ordinance if the automobile had the
right to be on the left-hand side of the street."

the facts and circumstances surrounding the person in charge of the automobile at and prior to the accident as disclosed by the evidence in determining the question whether the person operating said automobile was in the exercise of ordinary care to avoid injury to the plaintiff."

It has been held that a failure to comply with the provisions of a traffic ordinance is prima facie evidence of negligence. Johnson v. Panderast, 308 Ill. 255; Weber Co. v. Stevenson Grocery Co., 194 Ill. App. 432; and it was reversible error, under the evidence as disclosed by the record in this case to give this instruction to the jury. This instruction told the jury that even though defendant was operating his automobile on the left hand side of the street such fact was not sufficient to charge the defendant with negligence. What is or what is not negligence is ordinarily a question of fact for the jury, and it is improper to state such matter in an instruction. C. & A. R. R. Co. v. Kelley, 182 Ill. 267. Appellee insists that this ~~ordinance~~ ordinance is so uncertain and incomplete that it is void and cites City of Chicago v. Rumpff, 45 Ill. 90 and Hickey v. W. T. Ry. Co. 6 Ill. App. 172. We have examined these cases but find nothing stated in the opinion of either of them that would lead us to think the provisions of this ordinance are invalid. No objection was made in the trial court to the introduction of this ordinance and appellee's contention that the ordinance is void for uncertainty is evidently an afterthought. It is next insisted that even if this instruction did not state a correct proposition of law it was cured by the ninth instruction given on behalf of appellant but this is not the kind of an instruction which can be cured by other instructions. If instructions lay down contradictory rules, so that the following of one rule will lead to a different result from following the other the instructions are defective and misleading. Illinois Match Co. v. C.R. I.P. Ry. Co., 250 Ill. 396; Gilmore v. Fuller, 198 Ill. 130.

Complaint is also made of the sixteenth instruction given on behalf of appellee. This instruction is very much like appellee's fourth given instruction as set out in the opinion in the case of

...the person in the automobile was in the position of ordinary care to avoid injury to the plain-

1944 New York Times 10-11-44

It has been held that a failure to comply with the provisions

v. 1008 Ill. 285; Weber Co. v. Stevenson Grocery Co., 194

III. 1984 . 100 . 100

closed by the receipt of this communication is the

10-10-44

on his automobile on the left hand side of the street and left her

THE UNIVERSITY OF CHICAGO

... of the ...

FORM NO. 10-60 (REV. 1-60) GPO : 1960 O - 785-000

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081 . IRI 891 , Tel 74 , V 91111 : 196 . IRI 891 , .. 081 .

Druecker v. Sandusky Portland Cement Company, 93 Ill. App. 406, and it was there held that the giving of such an instruction did not constitute reversible error.

Other reasons are assigned and argued by appellant. We are not prepared to say that reversible error was committed other than herein above stated. For the error indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

... it was first held that the giving of such an instruction was not an
affirmative reversible error.

Other reasons are assigned and argued by exception. We are not
prepared to say that reversible error was committed other than herein
above stated. For the error indicated the judgment is reversed and
the cause remanded.

Reversed and remanded.

... of the court

... and the court

...
...
...

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON,
of Illinois and keeper of
the copy of the opinion of

Court, at Chicago

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 646⁴

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 20 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

on Tuesday, the seventh day of
Lord the President of the United States
and for the Record District

AN L. JONES, President

Hon. AUGUSTUS A. PARTLOW, Justice

Hon. THOMAS M. JETT, Justice

AUGUSTUS L. JOHNSON, Clerk

ERNEST WEINER, Sheriff

The opinion of the Court was filed

as of said Court in the words and

The People of the State of Illinois,

Defendant in error,

vs.

Elmer Saylor, et al.

Plaintiffs in error.

Writ of error to the Circuit

Court of Rock Island

County.

238 I.A. 646

Partlow, J.

Elmer Saylor, Leonard Saylor and Earl Saylor, who are brothers, together with Grace Saylor, who is the wife of Elmer Saylor, were indicted in the circuit court of Rock Island County for mayhem, the specific charge being the castration of Mark Edmund Pendleton. Upon the trial, Grace Saylor was acquitted, the other three defendants were found guilty, and their punishment was fixed as imprisonment in the penitentiary. To review the judgment a writ of error has been prosecuted from this court.

The indictment consisted of three counts. The first count was quashed, the motion to quash the other counts was overruled, and this ruling is assigned as error, it being contended that castration does not constitute mayhem within the meaning of our statute. Many cases are cited in support of this contention and plaintiffs in error review quite extensively the law of mayhem and the purpose sought to be accomplished by its enactment. What may or may not constitute mayhem in other jurisdictions is of little importance here unless the statutes upon which the decisions are based are similar to our statute. Our statute provides that "whoever, with malicious intent to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts off or tears an ear, cuts, slits, or mutilates the nose or lip, cuts off or disables a limb or other member of another person, shall be imprisoned in the penitentiary not less than one nor more than twenty years, or fined not exceeding \$1000.00, and confined in the county jail not exceeding one year." The question is whether castration is included within the terms "cuts off or disables a

The People of the State of Illinois,

Defendant in error,

vs.

Elmer Saylor, et al.

Plaintiffs in error.

County.

Court of Rock Island

Writ of error to the Circuit

238 I.A. 848

Parlow, J.

Elmer Saylor, Leonard Saylor and Earl Saylor, who are brothers, together with Grace Saylor, who is the wife of Elmer Saylor, were indicted in the circuit court of Rock Island County for mayhem, the specific charge being the conviction of Earl Saylor. At the trial, Grace Saylor was acquitted, the other three defendants were found guilty, and their punishment was fixed as imprisonment in the penitentiary. To review the judgment a writ of error has been prosecuted from this court.

The indictment consisted of three counts. The first count was quashed, the motion to quash the other counts was overruled, and this ruling is assigned as error, it being contended that conviction does not constitute mayhem within the meaning of our statute. Many cases are cited in support of this contention and plaintiffs in error to view quite extensively the law of mayhem and the purpose sought to be accomplished by its enactment. What may or may not constitute mayhem in other jurisdictions is of little importance here unless the statutes upon which the decision is based are similar to our statute. Our statute provides that "whoever, with malicious intent, to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts off or tears an ear, cuts, maims, or maims the nose or lip, cuts off or disables a limb or other member or member part, shall be imprisoned in the penitentiary not less than one nor more than twenty years, or fined not exceeding \$1000.00, and confined in the county jail not exceeding one year." The question is whether

limb or other member of another person", as used in the statute. In IV Blackstone, 205, it is said: "And, therefore, the cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be maims". In first Hawkins Pleas of the Crown, 175, it is said, "the cutting off or disabling or weakening a man's hand or finger, or striking out his eye, or foretooth, or castrating him, are said to be maims". To the same effect are Wharton's American Criminal Law, 300: First Wharton's Criminal Law, Section 766; 8 Ruling Case Law, page 304; State vs. Woods, 169 Pac. 39. Some cases may be found which announce a different rule, but under the language of our statute we think that castration comes within the statutory provisions defining mayhem, and the court properly refused to quash the second and third counts of the indictment.

Complaint is made of improper argument made to the jury by the state's attorney and his assistant, and several remarks are called to our attention which it is claimed were improper, highly prejudicial and contributed largely to the conviction of plaintiffs in error. The arguments to the jury do not appear in full in the record. The alleged errors are set out in the affidavits filed in support of the motion for a new trial. It does not appear that any objections were made to the remarks, or that the court was asked to restrain the argument in any way. It has been repeatedly held that a party to a suit will not be permitted to sit quietly by and, without objection, permit counsel on the other side to indulge in improper argument to the jury, and then assign error thereon. It is the duty of the aggrieved party to object at the time, ask the court to restrain the offender, and if he fails to do so his objections will be deemed to have been waived and they cannot be raised for the first time in a court of review. The fact that the improper remarks are later embodied in an affidavit in support of a motion for a new trial does not dispense with the necessity of objections and asking the court to restrict the argument to proper bounds.

"like or other member of another person", as used in the statute.
 In IV Massachusetts, 208, it is said: "And, therefore, the cutting off
 or disabling or weakening a man's hand or finger, or striking out
 his eye or foreteeth, or depriving him of these parts, the law of
 which is all within species trade category, are held to be within."
 In that law, the issue of the Crown, IV, is in said, "the cutting
 off or disabling or weakening a man's hand or finger, or striking
 out his eye, or foreteeth, or depriving him, are held to be within."
 To the same effect are Wharton's Criminal Law, 200; 1890;
 Wharton's Criminal Law, Section 200; 200; 200; 200;
 1890; 1890; 1890; 1890. Some cases may be found which announce
 a different rule, but under the language of our statute we think
 that distinction comes within the statutory provisions defining may-
 hem, and the court properly refused to grant the writ and find
 contrary of a judgment.
 The statute is made of improper argument and is the law of the
 state's attorney and his assistant, and several members are called
 to our attention which it is claimed were improper, highly propo-
 sitional and constituted largely to the satisfaction of plaintiffs in
 error. The argument is the law of the state in which it is
 made. The alleged errors are set out in the affidavit filed in support
 of the motion for a new trial. It does not appear that any object-
 ions were made to the remarks, or that the court was asked to re-
 strain the argument in any way. It has been repeatedly held that
 a party to a suit will not be permitted to sit quietly by and, with-
 out objection, permit counsel on the other side to indulge in im-
 proper argument to the jury, and then assign error thereon. It is
 the duty of the aggrieved party to object at the time, and the court
 to restrain the offender, and if it fails to do so, its failure
 will be deemed to have been waived and they cannot be raised for
 the first time in a court of review. The law of the state
 remains as it is embodied in an affidavit in support of a motion
 for a new trial, and the necessity of objections

Wilson vs. People, 94 Ill. 299; Earl vs. People, 99 Ill. 123; Campbell vs. People, 109 Ill. 565; People vs. Falkoditch, 280 Ill. 321; People vs. Parker, 284 Ill. 272. For these reasons the alleged improper remarks made in the argument to the jury are not properly before this court and will not be reviewed.

Our attention is called to many alleged improper acts and statements of the state's attorney and his assistant during the progress of the trial, and plaintiffs in error insist that this misconduct contributed largely to the verdict of the jury. The trial of this case occupied several weeks. The record contains almost fifteen hundred pages. The defense of Elmer Saylor was insanity and the other plaintiffs in error contended that they were not present at the time of the ~~law~~ alleged assault, and had no part in it. The record discloses an exceedingly revolting state of facts and it would serve no useful public purpose for this court to enter into a detailed statement or discussion of the evidence. On account of the plea of insanity, the court permitted the evidence to cover a wide range, including many acts and conversations of Elmer Saylor and others during a period of considerable time. Most of this evidence was offered by plaintiffs in error. During the trial many questions arose as to the admissibility of various items of evidence. At times the discussion and remarks became heated and very emphatic. Many improper remarks were made by the state's attorney and his assistant which cannot be approved, and if this misconduct had been confined to that side alone we would deem it our duty to reverse the judgment. The remarks and misconduct were not, however, confined to one side but they came from both sides. Within the reasonable limits of an opinion it would be impossible to set out in detail these incidents. Counsel for plaintiffs in error persistently attempted to introduce evidence which had been repeatedly excluded by the court. In the discussion of the evidence remarks and charges were made on both sides which were highly improper and should not have been tolerated. From the record we cannot say but what the misconduct of counsel was about equally divided and that

Illinois vs. People, 94 Ill. 232; People vs. People, 99 Ill. 122;

Campbell vs. People, 102 Ill. 555; People vs. People, 103 Ill. 555;

People vs. People, 104 Ill. 555. For these reasons the alleged

improper remarks made in the argument to the jury are not proper

to be reviewed.

Our attention is called to many alleged improper acts and state-

ments of the state's attorney and his assistant during the progress

of the trial, and plaintiff in error insists that this misconduct

contributed largely to the verdict of the jury. The trial of this

case occupied several weeks. The record contains almost fifteen

hundred pages. The defense of Wimer Baylor was lengthy and the

other plaintiff in error contended that they were not present at

the time of the ten alleged assaults, and had no part in it. The

record discloses an exceedingly revolting state of facts and it

would serve no useful purpose for this court to enter into

a detailed statement or discussion of the evidence. On account of

the plainness of the case, the state's attorney is entitled to

win the case, including many acts and conversations of Wimer Baylor

and others during a period of considerable time. Most of this evi-

dence was offered by plaintiff in error. During the trial many

questions arose as to the admissibility of various items of evi-

dence. At times the discussion and remarks became heated and very

emotional. Many improper remarks were made by the state's attorney

and his assistant which cannot be repeated, and it is believed

that had been confined to that side alone we would have it our duty to

reverse the judgment. The remarks and misconduct were not, however,

confined to one side but they came from both sides. Within the

reasonable limits of an opinion it would be impossible to set out

in detail these incidents. Counsel for plaintiff in error per-

manently attempted to introduce evidence which had been repeatedly

counsel for plaintiffs in error held their own with counsel on the other side. In this state of the record the question is whether the plaintiffs in error were so prejudiced by the actions and remarks of counsel on both sides that they did not have a fair and impartial trial. We have read the evidence carefully and have given due consideration to every question raised. There is no doubt that the assault on Pendleton was committed, and that it was unjustified under the law. Neither is there any question but what Elmer Saylor was the instigator, prime mover and actual and principal participant in that assault. We have no doubt under the evidence as to his sanity at the time the assault was committed. As far as he is concerned his guilt and accountability are established beyond a reasonable doubt. The other two plaintiffs in error claim they were not present when the assault was committed, took no part in it, and therefore are not guilty. We do not think the evidence sustains this contention, but on the contrary the evidence shows beyond a reasonable doubt that one was an actual participant in the assault and each is guilty as charged in the indictment. For the reason that the evidence, in our opinion, fully establishes the guilt of each and all of the plaintiffs in error, and for the further reason that there was improper conduct and remarks by counsel on both sides, we do not feel justified in reversing the judgment on account of the improper conduct and remarks of the state's attorney.

Complaint is made that the court improperly gave on behalf of the defendant in error, the second, fifteenth, sixteenth and twenty-second instructions. The plaintiffs in error tendered one hundred twenty-two instructions of which thirty-four were given. The practice of submitting so many instructions has been repeatedly condemned. *People vs. Munday*, 280 Ill. 32; *People vs. Burns*, 300 Ill. 361; *People vs. Boston*, 309 Ill. 77. It is impossible for the trial court when burdened with such a mass of instructions to give proper and intelligent consideration to each instruction submitted, and if the plaintiffs in error by such conduct render

...for plaintiff is error held their own with counsel on the
...In this state of the record the question is whether the
...in error were so prejudiced by the actions and remarks of
...that they did not have a fair and impartial
...We have read the evidence carefully and have given due con-
...There is no doubt that the
...and that it was unjustified
...Whether in these any question but what James Taylor
...and actual and principal parties
...We have no doubt under the evidence as to
...at the time the assault was committed. As far as he is
...are established beyond a
...The assault was committed, took no part in it,
...We do not think the evidence sus-
...but on the contrary the evidence shows be-
...and a reasonable doubt that one was an actual participant in the
...as charged in the indictment. For the
...in our opinion, fully establishes the
...and for the
...and remarks by
...we do not feel justified in reversing the
...and remarks of the
...attorney.
...that the court improperly gave or refused to
...the second, thirteenth, sixteenth and twenty-
...The plaintiff in error tendered one hundred
...of which thirty-four were given. The
...so many instructions has been repeatedly
...People v. Wynn, 200 Ill. 36; People v. Wynn, 200
...300 Ill. 77. It is impossible for
...with such a mass of instructions

it impossible for the trial court to properly consider the instructions submitted, courts of review will not go far out of their way to relieve that party from errors for which he alone is responsible. To do otherwise would put a premium upon such conduct. We have, however, examined the four instructions complained of and do not think plaintiffs in error were prejudiced by the giving of any of them.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

it is impossible for the trial court to properly consider the in-
 structions submitted, and the jury will not be out of their
 way to believe that party from errors for which he alone is respon-
 sible. To do otherwise would put a premium upon such conduct.
 have, however, examined the four instructions complained of and do
 not think plaintiffs in error were prejudiced by the giving of any
 of them. The judgment of the circuit court will be affirmed.
 Judgment affirmed.

IT IS ORDERED THAT

THE JURY BE DISMISSED

AND

THE COURT BE RECALLED

AND

AND

THE COURT BE RECALLED

AND

AND

AND

IT IS ORDERED THAT

THE JURY BE DISMISSED

AND

THE COURT BE RECALLED

AND

THE COURT BE RECALLED

AND

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 20th day of
August in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

2
Hearing denied October 6, 1925.
Abstract only.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 647

BE IT REMEMBERED, that afterwards, to-wit: On
24 1925- the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

2

today

Lord and Elizabeth

and

NORMAN L. JONES, JR.

AUGUSTUS

3

State Bank of Seaton,

appellant,

vs.

R. L. Bryans,

appellee.

Appeal from the Circuit

Court of Henderson

County.

238 I.A. 647

Jett, J.

On January 3, 1922, State Bank of Seaton, appellant, obtained a judgment for \$2406.18 and costs of suit by confession against R. L. Bryans, appellee, for the balance it claimed to be due on a certain promissory note of \$4500.00 that had been executed by Bryans & Bryans, James A. Bryans and R. L. Bryans. On motion of the defendant (appellee here) the judgment was opened and the defendant given leave to plead to the merits, the judgment to stand as security. Pleas were filed. There was a trial by jury and a verdict in favor of appellee and this appeal followed.

The only errors argued for a reversal are that the verdict is contrary to the evidence and that the court improperly refused the 1st, 2nd and 3rd instructions offered on behalf of appellant.

It appears that appellee, R. L. Bryans and James A. Bryans, his brother, were in business together at Seaton, Illinois, running a meat market and buying and selling live stock. The partnership terminated upon notice published in a newspaper in the locality in which they resided, either in 1909 or in September 1910, at which time appellee moved to his farm and devoted himself to farming. In 1909 appellee sold his interest in the butcher business to Harry Cassey. James A. Bryans and Cassey continued in business. It is the contention of appellee that the use of the partnership name of Bryans & Bryans after September, 1910, was unauthorized.

The indebtedness out of which the note sued on originated was a promissory note for \$950.00 dated September 18, 1911, given to the appellant by James A. Bryans. There is evidence in the record

State Bank of Boston,

Appellant from the Circuit

Appellant,

Court of Henderson

vs.

County.

J. L. Bryans,

Appellee.

238 I.A. 647

Left, 1.

On January 8, 1928, State Bank of Boston, appellant, obtained

a judgment for \$2406.18 and costs of suit by confession against

J. L. Bryans, appellee, for the balance it claimed to be due on a

certain promissory note of \$4500.00 that had been executed by

Bryans & Bryans, James A. Bryans and J. L. Bryans. On motion of

the defendant (appellee here) the judgment was opened and the de-

fendant given leave to plead to the merits, the judgment to stand

as security. Pleadings were filed. There was a trial by jury and a

verdict in favor of appellee and this appeal followed.

The only errors argued for a reversal are that the verdict is

contrary to the evidence and that the court improperly refused the

last, and 3rd instructions offered on behalf of appellant.

It appears that appellee, J. L. Bryans and James A. Bryans, his

brother, were in business together at Boston, Illinois, running a

meat market and buying and selling live stock. The partnership

terminated upon notice published in a newspaper in the locality in

which they resided, either in 1908 or in September 1910, at which

time appellee moved to his farm and devoted himself to farming. In

1909 appellee sold his interest in the butcher business to Harry

Geasey. James A. Bryans and Geasey continued in business. It is

the contention of appellee that the use of the partnership name of

Bryans & Bryans after September, 1910, was unauthorized.

The indebtedness out of which the note was executed was

to the effect that the firm name of Bryans & Bryans was signed to the note but appellee insists if such was the case it was without his knowledge. Appellee did not sign this note, nor was the indebtedness his. The indebtedness was increased by James A. Bryans in carrying on the business individually and the note for \$950.00 was afterwards renewed for an increased amount namely for \$2000.00 and was signed Bryans & Bryans by James A. Bryans. Other renewals were had from time to time until the execution of the note declared upon. While the name of R. L. Bryans appears on one or more of the notes executed prior to the time of the date of the note sued upon it is his contention that when he did so sign it was as surety.

The renewal note of March 3, 1914, being the last note that appears in this transaction that was made prior to the date of the note sought to be recovered upon was for \$4500.00 signed Bryans & Bryans, James A. Bryans and R. L. Bryans.

The note that is the basis of this suit is dated March 3, 1915, and was ~~given~~ signed by James A. Bryans and appellee and to which James A. Bryans signed the old firm name, Bryans & Bryans. It is the contention of appellee that this note was satisfied and paid by the giving of other notes at a later date in payment thereof. Appellee insists that he was not at the bank when these notes were made; that the business was conducted by James A. Bryans and it was the business of James A. Bryans; that the note sued on was signed by him at his farm with a pencil.

The evidence discloses that a number of notes were made by James A. Bryans and Ethel L. Bryans, his wife, subsequent to the date of the note sued upon. Six of these notes are in evidence. Four of the six notes were signed by James A. Bryans and Ethel L. Bryans and the other two by James A. Bryans alone. The first of the six notes was for \$4500.00 dated September 4, 1916 and the record discloses there is stamped on the face thereof

"State Bank of Seaton, Paid Mar. 7, 1917.
Seaton, Illinois."

to the effect that the firm name of Bryans & Bryans was signed to
the note but appellee insists it such was the case it was without
his knowledge. Appellee did not sign this note, nor was the in-
debtedness was increased by James A. Bryans. The indebtedness was increased by James A. Bryans
in January at the business individually and the note for \$250.00
was afterwards renewed for an increased amount namely for \$2000.00
and was signed by James A. Bryans. Other evidence
was that from time to time until the renewal of the note
while the name of R. L. Bryans appears on one or more of the
notes executed prior to the time of the note of the note ended upon
it is his contention that when he did no sign it was an error.
The testimony of James A. Bryans, dated March 8, 1916, is
that in this transaction that was made prior to the date of the
the note to be renewed, that was for \$2000.00 James A. Bryans
James A. Bryans and R. L. Bryans.
The note is to the effect of this suit is dated March 8, 1916,
and was signed by James A. Bryans and appellee and to which
James A. Bryans signed the old firm name, Bryans & Bryans. It is
the contention of appellee that this note was satisfied and paid by
the giving of other notes at a later date in payment thereof. Appellee
insists that he was not at the bank when these notes were made; that
the business was conducted by James A. Bryans and it was the business
of James A. Bryans that the note ended on was signed by him at his
home with a pencil.
The evidence disclosed that a number of notes were made by James
A. Bryans and Ethel L. Bryans, his wife, subsequent to the date of the
note and that some of these notes are in evidence. Some of the other
notes were signed by James A. Bryans and Ethel L. Bryans and the other
by James A. Bryans alone. The first of the six notes was for
\$2000.00 dated January 4, 1916 and the second disclosure there is
thereon on the face thereof, dated July 7, 1917.

The next three of the six notes are for the same amount namely, \$4500.00 each and are dated respectively February 28, 1918; September 5, 1918; and March 5, 1919 and each of these three notes is marked paid.

James A. Bryans paid \$2500.00 on the principal and made his individual note to the bank on September 4, 1919 for \$2000.00 the balance of his indebtedness, and this \$2000.00 note is marked paid. The payment was made by renewal. James A. Bryans made his note to the bank dated March 4, 1920 for \$2070 which included the six months interest on the note so paid.

On September 3, 1920 the said note for \$2070 was taken up and marked cancelled and James A. Bryans gave his note of that date for \$2070.00. This note was held by appellant at the time of the commencement of this suit which was January 3, 1922, and was still held by appellant at the time of the trial and up to the time the rebuttal evidence was heard on the part of appellee when it was surrendered by the president of appellant bank.

There is evidence tending to show that the indorsements of interest and the principal sum of \$2500.00 upon the note sued on were made at or near the time when James A. Bryans made the payments. The evidence further shows that no notice was given appellee by the bank that the note was held for claim against him until March, 1921, which was after his brother's death, which occurred in the year, 1921. That no notice was given appellee for a period of five and one-half years after the maturity of the note.

After an examination of the record the evidence tends to prove the following facts:

1. That the note sued on was a renewal and that R. L. Bryans, appellee, had signed only it and the note of March 3, 1914 in the same capacity.

2. That after the dissolution of the partnership of which R. L. Bryans and James A. Bryans were members, and after the retirement of R. L. Bryans to his farm in September, the firm was not indebted to the State Bank of Seaton.

The next three of the six notes are for the same amount namely, \$2000.00 each and are dated respectively February 28, 1918; September 1, 1918; and March 1, 1919 and each of these three notes is marked "Interest on the note so paid."

James A. Bryans paid \$2000.00 on the principal and made the installment note to the bank on September 4, 1919 for \$2000.00 the balance of his indebtedness, and this \$2000.00 note is marked paid. The payment was made by renewal. James A. Bryans made his note to the bank dated March 4, 1920 for \$2070 which included the six months interest on the note so paid.

On September 4, 1920 the said note for \$2070 was taken up and marked cancelled and James A. Bryans gave his note of that date for \$2070. This note was held by appellant at the time of the commencement of this suit which was January 3, 1922, and was still held by appellant at the time of the trial and up to the time the verdict was rendered on the part of appellant that it was extinguished by the payment of appellant.

There is evidence tending to show that the indebtedness of appellant and the estimated sum of \$2500.00 upon the note used on some date or other the time when James A. Bryans made the payment to the bank. Further it was shown that no notice was given appellee by the bank that the note was held for claim against him until March, 1921, which was after his brother's death, which occurred in the year, 1921. That no notice was given appellee for a period of five and one-half years after the maturity of the note.

After an examination of the record the evidence tends to prove the following facts: 1. That the note used was a renewal and that R. J. Bryans, appellee, had signed only it and the date of March 4, 1921 is the date after the dissolution of the partnership of which R. J. Bryans and James A. Bryans were members, and after the retirement of

3. That James A. Bryans executed and delivered to appellant bank his note for \$950.00 in the year 1911, the consideration therefor being money advanced him by the bank.

4. That R. L. Bryans had no interest in and took no part in the management of the business after checking out \$310.00 in September, 1910, at the time of his retirement to his farm.

5. That the indebtedness evidenced by the note sued on was incurred by James A. Bryans after the dissolution of the co-partnership and while doing business in the town of Seaton and with the bank in question.

6. That the note sued on and the note of March 3, 1914, were signed in pencil by R. L. Bryans at his farm in Henderson county and not in the bank at Seaton.

7. That no other note or notes were executed by R. L. Bryans in favor of said bank.

It is undisputed that the name of Ethel L. Bryans first appeared on the notes at the State Bank of Seaton after March 3, 1915. Mr. Seaton, the President of the bank testified that there were three notes of the series executed and delivered subsequent to March 3, 1915 on which the signature of James A. Bryans, R. L. Bryans and Ethel L. Bryans appeared and which were each of six months maturity.

Defendants exhibit 12 bears date September 4, 1916, but does not bear the name of R. L. Bryans. This note evidently is the third of the series spoken of by Mr. Seaton, President of appellant bank, as one of the three notes executed and delivered subsequent to March 3, 1915, on which the name, as he stated, R. L. Bryans appeared. The testimony of the witness Seaton is also to the effect that the alleged three notes executed after March 3, 1915, had been paid, were cancelled and surrendered, but no one was able to find any or either of them.

The testimony of appellee is that he never signed a renewal note after March 3, 1915. The record discloses that all of the renewal notes were presented to the bank by James A. Bryans. Appellee was not present on any of the occasions and therefore was not in any position to testify as to what was said or done when the notes were stamped as

1. That James A. Bryana executed and delivered to the bank his note for \$250.00 in the year 1911, the commission thereon being duly allowed him by the bank.

2. That James A. Bryana had no interest in and took no part in the management of the business after checking out \$210.00 in September, 1910, at the time of his retirement to his farm.

3. That the indebtedness evidenced by the note sued on was incurred by James A. Bryana after the dissolution of the co-partnership and while acting as a partner in the firm of Bryana and Nelson in the year 1910.

4. That the note sued on was the note of March 2, 1911, and was assigned and owned by E. L. Bryana at the time it was presented to the bank for collection.

5. That no other note or notes were executed by E. L. Bryana in the year 1911.

6. It is stipulated that the name of James A. Bryana was not on the note at the time it was presented to the bank for collection.

7. The President of the bank testified that there were three copies of the notes executed and delivered subsequent to March 2, 1911, in which the signature of James A. Bryana, E. L. Bryana and Ethel E. Bryana appeared and which were each of six months maturity.

8. The exhibits exhibit 12 bears date September 4, 1910, and does not bear the name of E. L. Bryana. This note was presented to the bank by the action spoken of by Mr. Nelson, President of respondent bank.

9. One of the three notes executed and delivered subsequent to March 2, 1911, in which the name, as he stated, E. L. Bryana appeared. The testimony of the witness Nelson is also to the effect that the three notes were executed after March 2, 1911, had been paid, were cancelled and destroyed, but no one was able to find any or either of them.

10. The testimony of the witness Nelson is that he never signed a personal note after March 2, 1911. The record discloses that all of the notes were presented to the bank by James A. Bryana. Appellants was not present on any of the committee and therefore was not an agent.

11. The record discloses that all of the notes were presented to the bank by James A. Bryana. Appellants was not present on any of the committee and therefore was not an agent.

12. The record discloses that all of the notes were presented to the bank by James A. Bryana. Appellants was not present on any of the committee and therefore was not an agent.

paid from time to time or when the first notes signed by James A. Bryans and Ethel L. Bryans were given. No one undertakes to testify as to what was said or done at the time when the renewal notes were presented by James A. Bryans. Seaton was the only one evidently who possessed that information. The intention of the parties at the time of the renewal of the notes is to be determined by the facts and circumstances surrounding the transaction. In this connection it is important to note the relation of the parties prior to the execution of the note declared upon. Appellee signed his last check on the Seaton bank in September, 1910 when he checked out the \$310.00. He signed two notes as surety for indebtedness incurred by James A. Bryans. One is the note sued on and one prior thereto. James A. Bryans substituted the name of his wife Ethel L. Bryans, paid all the interest and reduced the principal of the note after several renewals in the sum of \$2500.00 after March 3, 1915. Neither the bank nor James A. Bryans approached R. L. Bryans on the matter although both knew he signed as surety, and that each and every renewal note was due six months after date.

The record discloses that Seaton testified that after March 3, 1915 "we could never get any more action out of R. L. Bryans". This testimony of Seaton corroborates the statement of appellee that he never signed a note in favor of the Seaton bank after signing the note sued on. Five and one-half years elapsed and James A. Bryans had died before R. L. Bryans received notice that the note sued on was unpaid, although he lived within twelve miles of Seaton. Numerous renewals were made by James A. Bryans and by James A. Bryans and Ethel L. Bryans and the old notes were cancelled and stamped paid and on the death of James A. Bryans his note of \$2070.00, the balance of the indebtedness owed by him was filed by the bank as a claim against his estate. The \$2070.00 note was also retained by the bank and was surrendered in open court at the time of the trial.

The taking of new notes from time to time with the name of Ethel L. Bryans thereon and the taking of the note for \$2070.00

and the retention of the same are circumstances to be taken into consideration in determining whether or not the note sued on was paid. It was a question of fact for the jury to determine from the conduct of the parties and from all the facts and circumstances appearing in evidence, both before and after the execution of the note sued on, whether or not the bank intended to accept the notes of James A. Bryans and Ethel L. Bryans in lieu of the note sued on given in payment thereof.

A matter proper to be taken into consideration by the jury in determining the issue involved between the parties is the fact that the note sued on was retained by the bank after, according to the testimony of its president, it had taken other notes in renewal of the same from time to time which bore the signature of R. L. Bryans, a signature which he swore he knew and which renewal notes he cancelled and stamped paid.

In U. S. vs. L. L. Leach and Son, 191 Ill. App. 346-352, it was held, "The fact that the unpaid note was not surrendered before suit tends to show that it and not the original debt was considered to be the basis of liability".

"When questions of fact are passed upon by a jury properly and fully instructed as to the law, and a motion for a new trial is considered and refused by the trial court, the verdict will not be disturbed as against the weight of the evidence, on appeal, unless it is clearly so on some essential issue involved." Romano vs. Rockford City Traction Co., 230 Ill. App. 402-412; Kumorouski vs. Armour & Company, 198 Ill. App. 306-311. When all the facts and circumstances are considered we are of the opinion the finding of the jury cannot be said to be against the manifest weight of the evidence.

The first refused instruction complained of is as follows:

"The Court instructs you that the signature R. L. Bryans as the same appears on the note marked 'Plaintiff's Exhibit A' and introduced in evidence in this case makes the defendant R. L. Bryans liable to the plaintiff for such sum, as you find from the evidence in the case, is unpaid on said note, if you find there is any amount on said note which is unpaid, and that it was not necessary to make the defendant liable on the note that the plaintiff gave (give) to him any notice whatsoever that such note was due and unpaid."

and the retention of the same are circumstances to be taken into consideration in determining whether or not the note used on was a question of fact for the jury to determine from the testimony of the parties and from all the facts and circumstances appearing in evidence, both before and after the execution of the note used on, whether or not the bank intended to accept the note of James A. Bryans and Ethel L. Bryans in lieu of the note used on given in payment thereof.

A matter proper to be taken into consideration by the jury in determining the issue involved between the parties is the fact that the note used on was retained by the bank after, according to the testimony of its president, it had taken other notes in renewal of the same from time to time which bore the signature of E. L. Bryans, a signature which he swore he knew and which renewal notes he called and stamped paid.

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"When questions of fact are passed upon by a jury properly and fully instructed as to the law, and a motion for a new trial is considered and refused by the trial court, the verdict will not be set aside as against the weight of the evidence, on appeal, unless it is clearly so on some essential issue involved." Romano vs. Hoffert, 230 Ill. App. 408-412; Kemerovski vs. Almont & Company, 192 Ill. App. 306-311. When all the facts and circumstances are considered we are of the opinion the finding of the jury cannot be said to be against the manifest weight of the evidence.

The first refusal instruction complained of is as follows:

"The court instructs you that the signature E. L. Bryans as the same appears on the note marked 'Exhibit A' and introduced in evidence is the same as the signature of E. L. Bryans liable to the plaintiff for the same, as appearing from the evidence in the case, in which on such issue, if you

This instruction practically directs a verdict. If the court had given this instruction all the jury would have had to do would have been to compute the amount due on the note allowing in the computation the credits indorsed thereon. The effect of the instruction is that it tells the jury that the signature of appellee as it appears on the note makes him liable for what ever is unpaid thereon. This instruction not only ignores but excludes entirely the defense relied upon.

The second refused instruction of which appellant complains is;

"The Court instructs you that under the issues in this case if you believe from a preponderance of the evidence in the case that R. L. Bryans signed the promissory note upon which this suit is brought, then your verdict should be for the plaintiff for the amount you find from the evidence in the case is now unpaid on such note, if you do find that there is any amount unpaid thereon, even though you should further believe from the evidence that the partnership of Bryans & Bryans had been dissolved prior to the time the note upon which this suit is brought was executed."

Since it was not controverted that R. L. Bryans signed the note sued on this instruction in effect directs a verdict for the plaintiff leaving the jury nothing to do except ascertain if there was "any amount unpaid thereon". It ignores the defense and this could not be done when an instruction practically directs a verdict. In any event this instruction is misleading. A jury would reasonably understand that the expression, "any amount unpaid thereon", refers to the balance ascertained by computing the amount, due, taking into consideration the credits appearing on the back of the instrument. The question was not whether "any amount" was due thereon. If R. L. Bryans was liable there was some amount due and if not liable there was no amount due.

The third refused instruction reads:

"The Court instructs you that if you believe from a preponderance of the evidence in this case that the note upon which this action is brought was signed by the defendant, that the taking of other notes by the plaintiff for the same indebtedness, whether signed by the defendant or not, should not be found by you to be a payment of said note unless you further find from the evidence in the case that in the acceptance of such new notes the plaintiff intended that said notes should be paid thereby."

This instruction practically directs a verdict. If the court has given this instruction all the jury would have had to do would have been to compute the amount due on the note appearing in the exhibit and the credits indicated thereon. The effect of the instruction is that it tells the jury that the signature of appellee as it appears on the note makes him liable for what ever is unpaid thereon. This instruction not only ignores but excludes entirely the defense raised

The second refused instruction of which complainant complains is: "The court instructs you that under the issues in this case if you believe from a preponderance of the evidence in the case that E. L. Ryans signed the promissory note upon which this suit is brought, then your verdict should be for the plaintiff for the amount you find from the evidence in the case is now unpaid on such note, if you do find that there is any amount unpaid thereon, even though you should further believe from the evidence that the partnership of Ryans & Ryans had been dissolved prior to the time the note upon which this suit is brought was executed."

Since it was not controverted that E. L. Ryans signed the note and on this instruction in effect directs a verdict for the plaintiff leaving the jury nothing to do except ascertain if there was any amount unpaid thereon. It ignores the defense and this could not be done with an instruction practically directing a verdict. In any event this instruction is misleading. A jury would reasonably understand that the expression, "any amount unpaid thereon," refers to the balance ascertained by computing the amount due taking into consideration the credits appearing on the back of the instrument. The question was not whether "any amount" was due thereon. If E. L. Ryans was liable there was some amount due and if not liable there was no amount due.

The third refused instruction reads: "The court instructs you that if you believe from a preponderance of the evidence in this case that the note upon which this action is brought was signed by the defendant, that the taking of other notes by the plaintiff for the same indebtedness, whether signed by the defendant or not, should not be taken by you as a payment of said note unless you further find from the evidence in the case that in the absence of such new notes the plaintiff intended that said notes should be paid thereby."

Counsel for appellees admit that the instruction given informed the jury that payment is conditioned upon the intention of the parties, and that the parties must have intended that the old note was paid by the giving of the new note. The objection to this instruction is that it does not tell the jury that both parties must have intended payment. The instruction leaves it entirely to the plaintiff.

Appellant's seventh given instruction contained the qualification that there was no payment "unless it was understood by the parties and intended by them that the giving of such new notes should operate and be a payment of the note on which this suit was brought", and then proceeds to inform the jury that there should be a finding for the plaintiff unless it had been proved by a preponderance of the evidence that the new notes "were given by the parties making the same and accepted by the plaintiff with the understanding and intention that they should be in payment of the note on which this suit is brought". It will be seen that instruction number seven cured the vice found in the third refused instruction.

Furthermore after an examination of the instructions given on the part of appellant we are of the opinion that the jury was fully instructed upon every point involved in the case. The jury has passed upon the questions of fact and found against the contention of appellant. We believe that no serious error has been committed in the refusal of instructions offered on the part of appellant. The jury having been fully informed as to the law of the case, the judgment of the Circuit Court of Henderson County is affirmed.

Judgment Affirmed.

any party has been fully informed as to the law of the case, the judge-
ment of the district court of Henderson County is affirmed.
Very respectfully,
J. H. HARRIS, Clerk of the Court.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.



man of the

of the historical record

JUSTUS L.
State of Illinois

7477

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 647²

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 29 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to wit:

1911
1912
1913

AUGUST 11, 1911

FOR THOMAS M. LITTLE, Justice

JUSTUS L. JOHNSON, Clerk

WALTER SHERIFF

1911
1912
1913

W. C. Frieling, for use of
Henry Dummer,

appellant,

vs.

Appeal from the Circuit Court
of Kankakee County.

Frank P. Emling, et al,
appellees,

238 I.A. 647

Jett, J.

This is an appeal by W. C. Frieling for use of Henry Dummer, appellant, from an order of the court allowing the motion of Frank P. Emling, et al, appellees, to vacate certain judgments that had been entered against them.

It appears that on June 15th, 1923, a conditional judgment was entered against Frank P. Emling and Joseph Smith, co-partners doing business under the firm name of Emling and Smith, Frank P. Emling and Joseph Smith individually, F. G. Wilson and Mary Frieling for the sum of \$2315.00 with interest thereon from November 15th, 1922 in favor of appellant and on the same date, namely, June 15th, 1923 a conditional judgment was entered in favor of the appellant against the appellees for the sum of \$1988.14 with interest thereon from November 15th, 1922 and the two cases were consolidated in this court.

The orders of June 15th, 1923 providing for said conditional judgments also ordered writs of scire facias to issue. These writs were issued in both cases by the clerk of the Circuit Court on June 16th, 1923 and on June 18th, 1923 said writs were served by the sheriff of Kankakee County by reading the same and at the same time delivering a copy thereof to Joseph Smith as a member of the partnership firm of Emling and Smith and Joseph Smith individually, and F. G. Wilson and Mary Frieling, and also on Frank P. Emling, individually and as a member of the partnership firm on June 19th, 1923. The writs of scire facias were returnable to the October Term, 1923 of the said court.

The defendants failed to appear at the October Term, 1923, and on October 30th, 1923 default judgments were entered against said

W. G. Frieling, for use of

Henry Dummer,

Appellant,

Appeal from the Circuit Court

of Kennebec County.

vs.

Frank L. Emling, et al.,

Appellees.

2381A.647

1447

This is an appeal by W. G. Frieling for use of Henry Dummer, appellant, from an order of the court allowing the motion of Frank L. Emling, et al., appellees, to vacate certain judgments that had been entered against them.

It appears that on June 15th, 1923, a conditional judgment was entered against Frank L. Emling and Joseph Smith, co-partners doing business under the firm name of Emling and Smith, Frank L. Emling and Joseph Smith individually, F. G. Wilson and Mary Frieling for the sum of \$113.00 with interest thereon from December 15th, 1922 in favor of appellant and on the same date, namely, June 15th, 1923 a conditional judgment was entered in favor of the appellant against the appellees for the sum of \$198.14 with interest thereon from November 15th, 1922 and the two cases were consolidated in this court.

The orders of June 15th, 1923 providing for said conditional judgments also ordered writs of scire facias to issue. These writs were served in both cases by the clerk of the Circuit Court on June 15th, 1923 and on June 18th, 1923 said writs were served by the sheriff of Kennebec County by reading the same and at the same time delivering a copy thereof to Joseph Smith as a member of the partnership firm of Emling and Smith and Joseph Smith individually, and F. G. Wilson and Mary Frieling, and also on Frank L. Emling, individually and as a member of the partnership firm on June 18th, 1923. The writs of scire facias were returnable to the October Term, 1923 of the said court.

defendants in the one case in the sum of \$2425.93 and in the other case in the sum of \$2083.40.

It is claimed by appellees that they had no knowledge of the existence of the conditional judgments until July 5th, 1924 after which they filed their motion supported by affidavits to vacate the said judgments.

The motion supported by affidavits sets up that on the 15th day of November, 1922, Henry Dummer, in the Circuit Court of Kankakee County, obtained two judgments by confession against the said W. C. Frieling in the sums of \$2315.00 and \$1988.14 respectively; that on the said 15th day of November executions were issued on said judgments and delivered to the sheriff of said county and on the same day returned by the sheriff endorsed, "I hereby return this execution. No property found this 15th day of November, A.D.1922."

W. J. Riley
Sheriff

E. L. McIntyre
Deputy."

That on the 16th day of November 1922, Henry Dummer filed in said court actions in garnishment on each of said judgments, said suits being numbered 18014 1/2 and 18015 1/2 respectively and on the same day filed in said court a proceeding in attachment which case was numbered 18017. The appellees were summoned as garnishees in all three of said suits; that on the 28th day of December, 1922, interrogatories were filed by the plaintiff in all three suits, the said interrogatories being identical in character, words and substance and made a part of the motion and affidavit; that sometime thereafter they were advised by their counsel that the garnishment issue was the same in all three of said suits; that he had entered into an agreement and understanding with counsel for the plaintiff that garnishees should file answers to the interrogatories in the attachment suit; that the garnishment issue should be tried in said suit and that no action would be taken in the other cases pending trial of the garnishment issue in the attachment proceeding; that pursuant to that understanding answer to interrogatories were filed in the attachment suit on the 14th day of March, 1923; that

statements in the case in the year of 1932. It was in the year of 1932-33.

It is claimed by appellees that they had no knowledge of the existence of the additional judgments until July 5th, 1934 after which they filed their motion supported by affidavits to vacate the said judgments. The motion supported by affidavits sets up that on the 15th day of November, 1932, Henry Dummer, in the Circuit Court of Hancock County, obtained two judgments by confession against the said J. C. Phillips in the sum of \$211.00 and \$193.14 respectively; that on the said 15th day of November said judgments were entered on the docket and delivered to the sheriff of said county who on the same day returned to the sheriff's office, "two copies of said judgments. It properly found this 15th day of November, A.D. 1932."

J. C. Phillips
Debtor

Henry Dummer
Creditor

That on the 15th day of November 1932, Henry Dummer filed in said court motions in attachment on each of said judgments, said motions being numbered 18014 A and 18015 A respectively and on the same day filed in said court a proceeding in attachment which case was numbered 18017. The appellees were summoned as garnishees in all three of said cases; that on the 28th day of December, 1932, interrogatories were filed by the plaintiff in all three cases, the said interrogatories being identical in character, words and substance and with a part of the motion and affidavit; that sometime thereafter they were advised by their counsel that the judgments issued in all three of said cases; that he was advised that an execution was outstanding on each of the judgments; that said appellees should file answers to the interrogatories in the attachment and that the garnishment issue should be tried in all said cases and that no action would be taken in the other cases pending trial of the attachment issue in the attachment proceeding.

thereafter the attachment suit came on for trial on the 8th and 9th days of May, 1924, and upon the trial thereof at the conclusion of all of the evidence the court instructed the jury to find the issues in garnishment in favor of the defendants, appellees here. Judgment was entered accordingly and the defendants discharged; that on the 5th day of July, 1924, these defendants learned for the first time that contrary to the said agreement and understanding, plaintiff on the 15th day of June, 1923, obtained a default conditional judgment against them for the sums as hereinbefore stated; that on October 30th, 1923, all of the said defendants were again defaulted and said conditional judgments were confirmed; that they cannot recall that they were ever served by scire facias in either of said suits but if so relied upon said agreement and understanding; that said writs if served were never called to the attention of their counsel; that they are informed and believe, however, that neither of said judgments were indexed as against said defendants in the office of the said clerk until the 3rd day of July, 1924, and appeared in the daily "Abstract Record" under date of July 5th, 1924, from which defendants first obtained information that such judgments had been entered; that they have a meritorious defense to the whole of the demand of the plaintiff; that they are not now and were not, nor any or either of them, indebted to the said W. C. Frieling at the time of the filing of this suit.

The motion to vacate the judgment was also supported by an affidavit of the attorney for appellees, and a counter affidavit was filed by counsel for appellant. Upon a hearing the court entered an order vacating these judgments and from that order this appeal is prosecuted.

The only question involved in this proceeding is whether or not the court was justified in vacating the judgments. The authority for so doing is claimed by appellees to exist by virtue of Section 89 of the Practice Act abolishing the writ of error coram nobis and it has been held that the error under section 89 of the Practice

Act, which is sufficient to open up a judgment must be based upon fraud, duress or excusable mistake.

The record does not show that there was any duress and the most that can be said of the excusable mistake is that it was a mistake of counsel for appellees to depend upon the word of counsel for appellants. That such a state of affairs should arise as is indicated by this record is unfortunate. It is the contention of appellees that their attorney had an agreement with counsel for appellants^{two} by which no proceedings were to be had in the ~~the~~ cases in which conditional judgments were entered until after a disposition of the attachment suit. If the facts are true as stated in the affidavit of counsel for appellees then he has been overreached; if they are not true, appellees and their attorney have been negligent.

A motion to set aside a judgment rendered by default is always addressed to the discretion of the trial judge with which an appellate court will not interfere unless it has been abused. *Hallin vs. Penny*, 209 Ill. App. 230-232; *Dunlap vs. Gregory*, 14 Ill. App. 601-605.

In a case in which the facts alleged by affidavits show that there was an agreement between counsel that the case should be tried at an hour named, and if reached before, notice was to be given counsel. In violation of this agreement counsel for appellees proceeded to trial before the hour named, in the absence of the opposing counsel, and without notice to him. Held a good cause for setting aside the judgment. *Harvers et al. vs. Tribby*, 5 Ill. App. 411.

It will be remembered that the appellees were all garnishees in the three cases and the same interrogatories were submitted in the attachment proceeding as were filed in the conditional judgment cases, and that the question was tried out in the attachment cause and a finding in favor of appellees. This would indicate that appellees had a meritorious defense.

In the case of *Waugh vs. Suter*, 3 Ill. App. 274, it is said,

and, which is sufficient to open up a judgment must be based upon
trial, either on known or unknown mistake.
The record does not show that there was any guess and the word
that was of note of the mistake is that it was a mistake
of counsel for the purpose of appeal upon the word of counsel for
appellants. That such a state of affairs should arise as is indi-
cated in this record is unfortunate. It is the contention of
appellants that their attorney had an agreement with counsel for
appellees that no proceedings were to be had in the case
in which certain judgments were entered until after a dispo-
sition of the appeal was made. If the facts are true as stated in
the affidavit of counsel for appellants, then it is true that
it was not true, appellees and their attorney have been negli-
gent. In any event, the record shows that the judgment rendered by the trial judge was always
in accordance with the intention of the trial judge with which an appel-
late court will not interfere unless it has been shown. *Hall v. W.*
Tracy, 309 Ill. App. 236-238; Dunlap v. Gregory, 14 Ill. App. 601-
602.
In a case in which the facts alleged by affidavits show that
there was an agreement between counsel for appellants and appellees that no proceedings were to be had
in the case until after a disposition of the appeal was made, and if reached before, notice was to be given
counsel. In violation of this agreement counsel for appellants pro-
ceeded to trial before the hour named, in the absence of the appel-
lees and counsel, and without notice to the appellees.
It will be remembered that the appellees were all represented
in the trial court and the same interrogatories were submitted in
the attachment proceedings as were filed in the conditional judgment
proceedings, and that the question was asked in the attachment proceedings
and a finding in favor of appellants. The same finding was made in the attachment proceedings.

"In application to set aside default, we regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is evidently unjust, a certain degree of neglect may, especially as terms can be imposed, be held to be excusable".

If the contention of appellees is true then a great injustice has been done them. In proceedings of the character presented by this record we are inclined to follow the ruling of the trial judge who is in a better position to judge of the true facts because of his acquaintance with the situation and those with whom he is dealing. The trial judge had a reason for ruling as he did and we are not prepared to say that he abused the discretion lodged in him. We are of the opinion that justice and equity require that the judgment of the trial court should be sustained.

The judgment of the Circuit Court of Kankakee County will be affirmed which is accordingly done.

Judgment Affirmed.

In application to set aside verdict, we regard the point of a
material defense as significant the more important of the two
regards, and where the judgment is evidently unjust, a certain
degree of relief may, especially as terms can be imposed, be held
to be accessible.

If the contention of appellee is true then a great injustice
has been done them. In proceedings of the character presented by
this record we are inclined to follow the ruling of the trial judge
who is in a better position to judge of the true facts because of
his acquaintance with the situation and those with whom he is dealing.
The trial judge had a reason for ruling as he did and we are not pre-
pared to say that he abused the discretion lodged in him. We are
of the opinion that justice and equity require that the judgment of
the trial court should be sustained.

The judgment of the Circuit Court of Harrison County will be
affirmed which is accordingly done.
Judgment affirmed.

W. H. HARRIS, Clerk.

W. H. HARRIS, Clerk.

W. H. HARRIS, Clerk.

W. H. HARRIS, Clerk.

W. H. HARRIS, Clerk.

W. H. HARRIS, Clerk.

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 17th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty five

Justus L. Johnson
Clerk of the Appellate Court.

3

I have not yet
received the
letter from
you of the 10th
inst. I am
sorry to hear
that you are
ill. I hope
you will soon
be able to
write again.

493 / abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 647³

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 14 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

seventy day of
a thousand pin hundred

REMEMBERED, that all persons, now
the opinion of the Court was filed
of said Court in the year

Johnson Brothers, a
copartnership, etc.,

appellees,

vs.

Herman Vierke, Sheriff, etc.,
appellant.

Appeal from the Circuit Court
of Kane County.

238 I.A. 647

Jett, J.

For three years prior to March 23, 1924, August Baert was engaged in operating a dairy farm of one hundred and fifty acres which he rented for cash from C. W. Bolcum, Sr. Shortly after Baert moved upon the farm Bolcum learned that he was financially involved and to keep his property from being sold by his creditors Bolcum took up some of his outstanding notes which were renewed from time to time. At the time Baert abandoned the farm on March 23, 1924 he was indebted approximately \$6,000.00 to Bolcum. On the preceding day Baert's property consisted of nine horses, thirty-four highly bred Holstein milk cows, eighteen head of young cattle, one bull, some farming tools and a small quantity of oats, corn, rye and silo feed. On March 24, 1924, Bolcum took judgment against Baert upon several of his notes upon which executions were issued and levied upon eleven of the cows which were in the possession of appellees. Appellees thereupon instituted this suit in replevin which resulted in a verdict and judgment in their favor from which this appeal has been prosecuted.

Appellee, Alex Johnson, testified that between four and five o'clock Saturday afternoon, March 22, 1924, he went to the farm occupied by Baert with his brother Solomon and in the presence of Frank Van Derhoff and his hired man, appellees bought of Baert twenty-one head of cattle for \$1200.00 paying therefor by delivering to Baert a check which they had received in payment of a carload of cows recently shipped by them to Silas Palmer and Sons, a commission firm in Chicago. Appellee did not know the exact amount of the check but stated that

Appeal from the Circuit Court
of Kane County.

Johnson Brothers, a
partnership, etc.,
appellants,

vs.

Kenneth Wierke, Sheriff, etc.,
appellants.

3381 A. 647

1st.

For three years prior to March 28, 1924, August Baert was engaged in operating a dairy farm of one hundred and fifty acres which was rented for cash from G. W. Bolow, Sr. Shortly after Baert moved upon the farm Bolow learned that he was financially involved and to keep his property from being sold by his creditors Bolow took up some of his outstanding notes which were renewed from time to time. At the time Baert abandoned the farm on March 28, 1924 he was indebted approximately \$6,000.00 to Bolow. On the preceding day Baert's property consisted of nine horses, thirty-four highly bred Holstein milk cows, eighteen head of young cattle, one bull, some farming tools and a small quantity of oats, corn, rye and silo feed. On March 24, 1924, Bolow took judgment against Baert upon several of his notes upon which executions were issued and levied upon eleven of the cows which were in the possession of appellants. Appellants thereupon instituted this suit in reply in which resulted in a verdict and judgment in their favor from which this appeal has been presented.

Appellants, Alex Johnson, testified that between four and five o'clock Saturday afternoon, March 28, 1924, he went to the farm occupied by Baert with his brother Bolow and in the presence of them Ben Bernoff and his hired man, appellants bought of Baert twenty-one head of cattle for \$1200.00 paying therefor by delivering to Baert a check which they had received in payment of a contract of cows recently shipped by them to Elias Palmer and sons, a commission broker in Chicago.

it was over \$1400.00 and that in addition to giving Baert this check he gave him some cash (the amount of which he was unable to state) and received from him besides the cattle several Liberty Bonds. He was unable to remember whether he received from Baert two or three bonds and was not sure but thought the bonds were each of \$100.00 denomination.

Appellees, Frank Van Derhoff and his hired hand drove from Baert's place the twenty-one head of cattle appellees claimed to have purchased, and thirty-one head of other cattle together with six horses. Van Derhoff lived between the farm occupied by Baert and the farm of appellees and although appellee, Alex Johnson, testified he did not know to whom the eighteen young cattle belonged, yet when they arrived at the Van Derhoff farm the said eighteen young cattle and the six horses were driven there and left. The remaining thirty-four cattle were driven to the farm of appellees. Of these thirty-four cattle appellees claim to have purchased twenty-one and thirteen were, on the following Monday, according to the testimony of Alex Johnson, shipped by appellees, at Baert's request, to Chicago and there sold for a little more than \$800.00 but how much more the witness was unable to state. He further testified that appellees received the returns from the thirteen head from the commission firm in Chicago and applied the amount so received to the indebtedness of Baert to them, which indebtedness was in existence at the time appellees gave Baert the Palmer and Sons check for \$1400.00 in payment of the twenty-one head. Of the twenty-one head of cattle appellees claim to have purchased they sold ten to Swen Oleson and it was the remaining eleven which were levied on by appellant under the executions issued upon the Bolcum judgments. This witness is the only witness who testified in chief on behalf of appellees. We have read with care his testimony. The examination and particularly the cross-examination of this witness discloses an inclination to evade and a lack of memory as to many of the details of his transaction with Baert and his account of the purchase of these cattle is not one which inspires confidence in its truth. His testimony that he gave Baert the Palmer and Sons check for \$1400.00 was discredited by the

it was over \$1400.00 and that in addition to giving Beart this check
he gave him some cash (the amount of which he was unable to recall) and
received from him besides the cattle several Liberty Bonds. He was
unable to remember whether he received from Beart two or three bonds
and was not sure but thought the bonds were worth \$125.00 each.
Appellee, Frank Van Derhoff and his hired hand drove from Beart's
place the twenty-one head of cattle appellees claimed to have purchased
of, and thirty-one head of other cattle together with six horses. Van
Derhoff lived between the farm occupied by Beart and the farm of
appellees and although appellee, Alex Johnson, testified he did not
know to whom the eighteen young cattle belonged, yet when they arrived
at the Van Derhoff farm the said eighteen young cattle and the six
horses were driven there and left. The remaining thirty-four cattle
were driven to the farm of appellees. Of these thirty-four cattle
appellees claim to have purchased twenty-one and thirteen were, on
the following Monday, according to the testimony of Alex Johnson,
delivered by appellees, at Beart's request, to Chicago and there sold
for a little more than \$10.00 but how much more the witness was
unable to state. He further testified that appellees received the
balance from the fifteen head from the commission firm in Chicago
and applied the amount so received to the indebtedness of Beart to
them, which indebtedness was in existence at the time appellees gave
Beart the Palmer and Sons check for \$1400.00 in payment of the twenty-
one head. Of the twenty-one head of cattle appellees claim to have
received they sold ten to Swen Olson and it was the remaining
eleven which were levied on by appellant under the execution issued
from the Police Judge. This witness is the only witness who
testified in chief on behalf of appellees. We have read with care
the testimony. The examination and particularly the cross-examina-
tion of this witness discloses an inclination to evade and a lack
of memory as to many of the details of his transaction with
Beart and the account of the purchase of these cattle is not one which

book-keeper of Palmer and Sons, a witness called by appellant, it appearing that no check of any such amount had ever been issued to appellees by Palmer and Sons. Furthermore his testimony as to his manner of payment and the taking of a receipt from Baert are at variance with statements attributed to him by the witness Howard Orr and others who had a conversation with him about these matters within a day or two after the transaction.

According to the witness Frank Van Derhoff who was called in rebuttal by appellees, the check which appellees gave Baert was dated March 20, 1924 and was for the sum of \$1125.77. This check was offered in evidence by appellant and was endorsed by appellees and by Van Derhoff. Baert's name does not appear thereon. Van Derhoff testified that Baert brought it to his place on Sunday, March 23 and he, Van Derhoff, cashed it by giving Baert the full amount thereof in five, ten and twenty dollar bills and explained his ability to so cash it by stating that although he had a bank account and did a regular checking business with his bank at St. Charles, still some one (no name given) from Iowa paid him a couple of weeks before this time \$1600.00 in cash for a note which he held against the Iowa party.

Appellees offered no testimony as to the value of Baert's property or any part thereof. The value of all the cows, heifers, horses, farming implements and grain, being substantially all the personal property on the Baert farm prior to the driving off of the cattle and six of the horses on March 22, was between \$5700.00 and \$5900.00 and the value of the stock driven away by appellees and Van Derhoff on this particular Saturday afternoon was between \$4600.00 and \$4800.00. The value of the three horses, farming tools, the feed and all other personal property belonging to Baert remaining on the premises after appellees and Van Derhoff had driven away all the cattle and six of the horses was approximately \$1100.00. The value of the twenty-one cattle which appellees insist they purchased for \$1200.00 was placed by the disinterested witness, Andrew ^{Anderson,} ~~Johnson~~ at \$2030.00 who fixed the value of ten of these which were sold by appellees to Oleson at \$1125.00. The valuation of the cattle and

book-keeper of Robert and Jane, a witness called by defendant, is
appearing that no check of any such amount has ever been issued to
appears by Robert and Jane. Furthermore his testimony as to his
number of payment was the same as a receipt from Robert for at
various with witnesses attributed to him by the witness Robert for
and others who had a conversation with him about these matters with
one or two after the transaction.
According to the witness Frank Van Dusen who was called in
testified by defendant, the check which appeared from Robert was dated
March 23, 1934 and was for the sum of \$100.00. This check was
entered in evidence by defendant and was admitted by witnesses and
by Van Dusen. Robert's name does not appear thereon. Van Dusen
testified that Robert brought it to his place on Sunday, March 23, and
he, Van Dusen, cashed it by giving Robert the full amount thereof
in five, ten and twenty dollar bills and explained his ability to
do so as by stating that although he had a bank account and did a
regular banking business with his bank at St. Paul, still some
times \$100.00 is cash for a note which he held against the bank.
Defendant offered as testimony as to the value of Robert's
party on any part thereof. The value of all the cash, however,
between, finding defendant was \$100.00, being approximately all the
personal property of the Robert family which he was bringing with him
cash and also of the money in bank, \$100.00, was \$100.00 and
\$100.00 and the value of the cash given away by defendant was
Van Dusen on this particular matter witness also was present. (Exhibit
was \$100.00. The value of the three boxes, being books, was
less and all other personal property including the house furniture
on the furniture which appeared and Van Dusen had agreed with all
the value and all of the boxes was approximately \$100.00. The
value of the three boxes which appeared before the jury was
the \$100.00 was given by the defendant's witness, Van Dusen.

horses driven to Van Derhoff's varied from \$1225.00 to \$1405.00.

It is conceded that no attempt was made by Baert to comply with the provisions of the Bulk Sales Act. It has been held that the provisions of this act applies to sales by one who is engaged in farming and dairying. *Weskalnies v. Hesterman*, 288 Ill. 199. In fact it applies to any sale or transfer in bulk of the major part of the goods of the vendor's business otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business. *La Salle Opera House Company vs. La Salle Amusement Company*, 289 Ill. 194. Appellees insist, however, that inasmuch as they only purchased twenty-one cows it was not a sale by Baert of the major part of his business. While it is true that appellees claim to have purchased only twenty-one head of cattle there was transferred to their possession by Baert at the time of the purchase, thirteen head of other cattle which they, the second day thereafter, shipped and sold for Baert. The statute applies to the sale, transfer or assignment of the major portion of the vendor's property and while there is no direct evidence in the record disclosing the nature of the transaction by Van Derhoff it is admitted that all the stock used by Baert in his dairying business was removed by appellees and Van Derhoff from Baert's premises at the same time and it is immaterial whether there was a sale to Van Derhoff or not as there was in fact a transfer to him. By this action of appellees and Van Derhoff, Baert was bereft of the means of conducting his usual business of dairying and it was just such a transaction that the statute avoids.

Appellees next insist that appellant is not in a position to invoke the provisions of the Bulk Sales Act inasmuch as he did not specially plead it, and while unable to cite any authorities sustaining their contention, insist that the same rule should be applied as is applied when the statute of frauds is relied upon. In the instant case appellant filed the general issue and several special pleas, by one of which he pleaded that the property taken was the property of appellant, by another that the property taken was the property of Baert, and by another that at the time the property was taken by appellant he, as sheriff, seized the same by virtue of executions

carried driven to Van Dornoff's varied from \$1225.00 to \$1405.00.

It is conceded that an attempt was made by Best to comply with

the provisions of the Bulk Sales Act. It has been held that the pro-

visions of this act applies to sales by one who is engaged in farming

and dairying. *Weeks v. Westerman*, 288 Ill. 193. In fact it

applies to any sale or transfer in bulk of the major part of the goods

of the vendor's business otherwise than in the ordinary course of

trade and in the regular and usual prosecution of the vendor's busi-

ness. *La Salle Opera House Company vs. La Salle Amusement Company*,

124 Ill. 194. Appellees insist, however, that inasmuch as they only

possessed twenty-one cows it was not a sale by Best of the major part

of his business. While it is true that appellees claim to have pur-

chased only twenty-one head of cattle there was transferred to their

possession by Best at the time of the purchase, thirteen head of

other cattle which they, the second day thereafter, shipped and sold

for cash. The statute applies to the sale, transfer or assignment

of the major portion of the vendor's property and while there is no

direct evidence in the record disclosing the nature of the transaction

by Van Dornoff it is admitted that all the cows were sold to him

and that appellees were removed by appellees and Van Dornoff from

Best's premises at the same time and it is immaterial whether there

was a sale to Van Dornoff or not as there was in fact a transfer to

him. If this action of appellees and Van Dornoff, Best was deprived

of the means of conducting his usual business of dairying and it was

such a transaction that the statute applies.

Appellees next insist that appellant is not in a position to

invoke the provisions of the Bulk Sales Act inasmuch as he did not

actually place it, and while unable to cite any authorities sustain-

ing their contention, insist that the same rule should be applied as

is applied when the statute is invoked in such cases. In the

case appellant filed the general issue and several special issues.

One of which he pleaded that the property taken was the property of

appellant, another that the property taken was the property of

placed in his hands, the same having been issued upon judgments rendered in favor of Bolcum against Baert and averring that said property was the property of Baert subject to said executions and was not the property of appellees. To the several pleas replications were filed averring that the property taken by appellant was the property of appellees and was not the property of either appellant or Baert and was not subject to levy under said executions issued upon the several judgments recovered by Bolcum against Baert. Under the pleadings the issuable fact was the right of property in the plaintiffs and under such an issue the plaintiffs must recover upon the strength of their own title and it was incumbent upon them to affirmatively prove their right to possession as against both appellant and Bolcum, the judgment creditor. *Baldwin v. Smith*, 143 Ill. App. 56; *Constantine v. Foster*, 57 Ill. 36.

In the case of *Seimon v. Allard*, 15 Ill. App. 568, it was held that evidence to prove that a sham sale of the goods replevined had been made by the judgment debtor to the plaintiff was admissible under the pleadings identical with those in the instant case, the Appellate Court there stating, (page 70) "By the introduction in evidence of the judgment and execution appellants were placed in a position, as judgment creditors of Decker, to attack the title of a fraudulent vendee of the latter, and by no rule of pleading applicable to actions of replevin were they required to disclose in advance the grounds of their attack". In the instant case appellees relied upon a sale to them by Baert and they should be prepared to show that it was made in good faith, for an honest purpose, in compliance with the provisions of the Bulk Sales Act and valid in all other respects. *Strohm v. Hayes*, 70 Ill. 41. *Thornton v. Hendrickson*, 213 Ill. App. 121.

From the evidence as disclosed by this record the earmarks of fraud are apparent. This was not a sale in good faith by Baert to appellees.

For the reasons indicated the judgment of the Circuit Court is reversed and remanded.

Reversed and Remanded.

...in his hands, the same having been issued upon judgments rendered in favor of Bolam against Best and against the property of Best and against the property of appellants. To the several pleas appellants were filed ... that the property taken by appellant was the property of appellants and was not the property of either appellant or Best and was not subject to levy under said executions issued upon the several judgments recovered by Bolam against Best. Under the pleadings the ... fact was the right of property in the plaintiffs and under ... the plaintiffs must recover upon the strength of their title and it was incumbent upon them to affirmatively prove their title to possession as against both appellant and Bolam, the judgment ... Baldwin v. Smith, 148 Ill. App. 56; Constantine v. Foster, 111 Ill. 38.

In the case of Bolam v. Alford, 15 Ill. App. 568, it was held ... to prove that a sham sale of the goods remained and was made by the judgment debtor to the plaintiff was admissible under the pleadings identical with those in the instant case, the Appellate Court there stating, (page 70) "By the introduction in evidence of the judgment and execution appellants were placed in a position, as judgment creditors of Decker, to attack the title of a fraudulent vendee of the latter, and by no rule of pleading applicable to actions of ... they required to disclose in advance the grounds of their attack. In the instant case appellants relied upon a sale to them by Decker and they should be prepared to show that it was made in good faith, for no honest purpose, in compliance with the provisions of the ... act and valid in all other respects. *Strom v. Hayes*, 70 Ill. 41. *Strom v. Hayes*, 111 Ill. 121.

From the evidence as disclosed by this record the execution of ... This was not a sale in good faith by Decker to appellants. For the reasons indicated the judgment of the Circuit Court is reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 17th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

A. J. Foster Jr.

1890

and his family

the year 1890

Abstract only -

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 647⁴

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 29 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



and

NOT

ROD. AUGUSTO

THOMAS

1881

Isaac Thomasson,

appellee,

Appeal from Circuit Court

vs.

of Iroquois County

Central Illinois Public Service Company,

appellant,

238 I.A. 647

Jones, P. J.

Isaac Thomasson, appellee and plaintiff, instituted this suit against the Central Illinois Public Service Company, defendant, and appellant here. He recovered a judgment for \$2500 upon a verdict of a jury in the circuit court of Iroquois County for personal injuries.

The declaration contained two counts. The first averred that the defendant company, through its servants, was engaged in taking down certain electric wires and other appliances attached to poles, along a highway opposite a certain field in which the plaintiff was working and driving a team of horses with a farm disc attached thereto; that the plaintiff, in the exercise of due care for his own safety, was driving said team of horses from a field upon the public highway, and while so doing, one of the defendant's servants negligently and carelessly permitted a cross-arm to drop from a certain pole from a height of twenty feet upon the ground near said team so that the team became greatly frightened and ran away, causing the plaintiff to be thrown to the ground and dragged so that he was injured by said disc and lost one thumb and the use of his hand was greatly impaired; and that he received other great bodily injuries. The second count is substantially the same as the first, but has the additional averment that the fall of the cross-arm made a great noise and frightened the said team of horses.

Counsel for defendant urges that the motion in arrest of judgment should have been sustained because of alleged insufficiency of both counts of the declaration. It is claimed that the defendant's

James Thompson,

appellee,

Appeal from Circuit Court
of Illinois County

vs.

Central Illinois Public Ser-

vise Company,

appellant.

238 I.A. 647

Jones, P. J.

James Thompson, appellee and plaintiff, instituted this suit against the Central Illinois Public Service Company, defendant, and appellee here. He recovered a judgment for \$2500 upon a verdict of a jury in the circuit court of Illinois County for personal injuries.

The decision contained two counts. The first averred that the defendant company, through its servants, was engaged in taking down certain electric wires and other appliances attached to poles along a highway opposite a certain field in which the plaintiff was working and driving a team of horses with a farm also attached thereto; that the plaintiff, in the exercise of due care for his own safety, was driving said team of horses from a field upon the public highway, and while so doing, one of the defendant's servants negligently and carelessly permitted a cross-arm to drop from a certain pole from a height of twenty feet upon the ground near said team so that the team became greatly frightened and ran away, causing the plaintiff to be thrown to the ground and dragged so that he was injured by said fall and lost one thumb and the use of his hand was greatly impaired; and that he received other great bodily injuries. The second count is substantially the same as the first, but has the additional averment that the fall of the cross-arm made a great noise and frightened the said team of horses. Counsel for defendant urges that the motion is avowed of help-

2

servants, in dismantling the transmission line, were doing what they might lawfully do and that there is no averment in either count of any duty of the defendant to refrain from dropping the cross-arm at the time it is charged by the plaintiff that the same was dropped.

The first count contains no averment as to noise. It charges that the defendant's servants negligently and carelessly permitted the cross-arm to drop upon the ground near the team so that the team became frightened and ran away. The second count charges that the falling of the cross-arm made a great noise and frightened the horses so that they ran away. It does not expressly aver that it was the duty of the defendant not to so drop the cross-arm, and occasion a noise that would likely cause the horses to run away, nor do we think any such particularity of averment is necessary upon a motion in arrest of judgment or even upon demurrer. Upon demurrer a declaration is construed against the pleader, but after verdict all intendments and presumptions are in its favor. (Sargent Co. v. Baublis, 215 Ill. 428; Chicago City Ry. Co. v. Shreve, 226 Ill. 530.) When a declaration sets up a state of facts, the existence of which gives rise to a duty and discloses a failure to perform that duty together with a resultant injury, there is a sufficient charge of actionable negligence. Both counts set forth a situation that necessarily implies a duty not to drop a cross-arm close to approaching horses or so as to produce a great noise close to them. It is well understood by everybody that a great noise so produced is likely to scare horses and cause them to run away. In Miller v. Kresge Co. 306 Ill. 104, the Supreme Court said: "It is sufficient if the facts stated are such as to raise a duty and show a failure to perform that duty and a resulting injury from which the law will attach to such failure of duty the charge of negligence." We think the counts are good.

On May 11th, 1923, the defendant was engaged in dismantling an abandoned transmission line along a public highway about three miles northwest of the Village of Milford. The work was being conducted by a force of six men under the direction of H. O. Cherry,

At the time it is charged by the plaintiff that the same was dropped, it was not lawfully so and that there is no evidence to which resort may be had to establish the same.

The first count contains no averment as to notice. It charges that the defendant's servants negligently and carelessly permitted the cross-stm to drop upon the ground near the team so that the team became frightened and ran away. The second count charges that

the falling of the cross-arm made a great noise and frightened the horses so that they ran away. It does not expressly aver that it was the act of the defendant not to so drop the cross-arm, and occasion a noise that would likely cause the horses to run away.

...all judgments and assumptions are in its favor. (Exhibit 1)

III. 310.1. When a legislation sets up a state of facts, the existence of which gives rise to a duty and discloses a failure to perform that duty together with a resultant injury, there is a

close to them. It is well understood by everybody that a crowd
 can close to approaching horses or so as to produce a great noise
 a situation that necessarily implies a duty not to drop a cross-
 sufficient charge of actionable negligence. Both counts set forth

... In *Miller v. Krueger Co.*, 308 Ill. 194, the Supreme Court said: "It is established in the facts stated are such as to raise a duty and show a failure to perform that duty and a violation of it."

On May 11th, 1951, the defendant was engaged in a
 conversation with the witness at the time a public highway about three
 miles from the defendant's residence was closed by a landslide.

Division Line Foreman. The transmission line was located along the south side of a public highway running east and west. The poles were approximately 110 feet apart. The wires had been detached and thrown upon the ground. The work of taking the cross-arms from the poles was in progress at the time of the accident somewhere about ten thirty o'clock in the morning. The plaintiff was a farm hand employed by Percy Martin and was engaged in discing a field immediately south of the highway where defendant's employees were at work. He started to drive to his home, and this required him to go out upon said public highway and then west. A fence separated the public highway from the field but there was a gap in the fence through which the plaintiff drove to and from the field. He testified that as he approached the gap he saw the men at work on the poles loosening the cross-arm and he asked them to let him out; that one man held up the wires so that plaintiff could drive under them; and that just as he got past he heard the cross-arm or something fall behind him. The horses jumped, ran across the road and then east down to a ditch, where he was thrown off and received the injuries complained of. He did not testify that it was a cross-arm that fell. In fact he did not appear to know what caused the noise, except that it sounded to him like something had fallen just behind him.

Percy Martin, the man for whom plaintiff worked, testified that he saw a man drop a cross-arm from the second pole west of the gap; that at the time the cross-arm was dropped the team was just through the gap and started to run; and that he was thirty rods west of the gap and about ten rods down in the field. He states, however, that he was only about one hundred twenty feet from where the cross-arm was dropped. The plaintiff and Martin were the only ones who testified on behalf of plaintiff to the occurrences at the time of and just before the accident.

On behalf of the defendant six witnesses testified, all of whom were employees of the defendant company and were present at the time of the accident. Their testimony is in sharp conflict

Division Line Foreman. The transmission line was located along the
east side of a public highway running east and west. The poles
were approximately 110 feet apart. The wires had been detached
and thrown upon the ground. The work of taking the cross-arms
from the poles was in progress at the time of the accident somewhere
about ten thirty o'clock in the morning. The plaintiff was a farm
hand employed by Larry Martin and was engaged in disassembling a field
cross-arm of the highway where defendant's employees were
at work. He started to drive to his home, and this required him
to go out upon said public highway and then west. A fence separated
the public highway from the field but there was a gap in the fence
through which the plaintiff drove to and from the field. He testified
that just as he approached the gap he saw the men at work on the
poles dismantling the cross-arm and he asked them to let him out;
that one man held up the wires so that plaintiff could drive under
them; that just as he got past he heard the cross-arm or some-
thing fall behind him. The horses jumped, ran across the road and
then east down to a ditch, where he was thrown off and received
the injuries complained of. He did not testify that it was a cross-
arm that fell. In fact he did not appear to know what caused the
accident, except that it sounded to him like something had fallen just
behind him.

Larry Martin, the man for whom plaintiff worked, testified that
he saw a man drop a cross-arm from the second pole west of the spot
that at the time the cross-arm was dropped the team was just starting
the way and started to run; and that he was thirty rods west of
the gap and about ten rods down in the field. He stated, however,
that he saw only about one hundred twenty feet from where the cross-
arm was dropped. The plaintiff and Martin were the only ones who
testified on behalf of plaintiff to the witnesses at the time of
the accident and defendant.

In all of the testimony six witnesses testified.

with that of the testimony of both of plaintiff's witnesses in many material respects. We will not endeavor to set out their testimony in detail but it tended to show that the horses did not run away as the result of fright occasioned by the dropping of a cross-arm. Their version of the incident is that in order to hold up the wires at the gap so that plaintiff might drive through it and upon the road, one of the men stood upon a post and was supported by a long hook or spur, around the handle of which he had one of his legs wrapped, and that while thus supported he held the wires above his head; that as the team approached the gap, a roan colt, hitched on the left hand side of the team of four, was prancing and as it got to the gap and opposite the man holding the wires, it started to ~~shun~~ shy worse and worse; that the other horses followed and the team ran away; that there was a man on the pole ten or eleven feet west of the gap and another man on the next pole west one hundred ten feet away; that each of said men was engaged in taking off a cross-arm; that all work stopped while the team was coming through the gap in pursuance of an order from the foreman; and that the cross-arms were not dropped to the ground until after the team had started to run away and was at least one hundred fifty feet east of the gap.

According to the version of Percy Martin, the team became frightened because of the falling of a cross-arm from the second pole west of the gap. The testimony shows that this pole was approximately one hundred twenty feet from the gap. He does not claim that the man on the pole immediately west of the gap dropped his cross-arm prior to the runaway. While Martin said he was only one hundred twenty feet from the pole where the cross-arm dropped, he maintained that he was forty rods west of the gap and ten rods south. If he has correctly located his position in the ~~file~~ field he was over five hundred feet from the gap and obviously not in as good position to know what was going on as the men who were within a few feet of it. To say the least the evidence relating to the cause of the runaway was highly conflicting and under the circumstances it

with that of the testimony of both of plaintiff's witnesses in many
material respects. He will not undertake to say that the testimony
of each is correct in every particular but it is correct in the main
as the result of fright occasioned by the dropping of a cross-arm.
Their version of the incident is that in order to hold up the wires
at the gap no that plaintiff might drive through it and upon the
road, one of the men went upon a pole and was supported by a long
beam on each side, across the heads of which he was to be
carried, and that while this beam supported the wires above him
nearly that on the team approached the gap, a moon came, pitched
on the left hand side of the team of four, was grasped and as
it got to the gap and opposite the man holding the wires, it started
to go down and worse; that the other horses followed
and the team ran away; that there was a man on the pole ten or
eleven feet west of the gap and another man on the pole ten or
one hundred feet west, that when it was seen that the beam was
falling off a cross-arm; that all went straight with the beam and
coming towards the gap in consequence of an order from the foreman;
and that the cross-arm was not dropped to the ground until after
the team had started to run away and was at least one hundred fifty
feet east of the gap.

According to the version of Jerry Smith, the team foreman,
plaintiff's version of the falling of a cross-arm from the pole
pole west of the gap. The testimony of Jerry Smith and the other
witnesses is that the team ran away from the gap. The team and driver
that was on the pole immediately west of the gap dropped the
cross-arm before to the roadway. While Smith says he saw only one
cross-arm falling from the pole above the cross-arm falling,
he maintained that he was forty feet west of the gap and had only
seen it. It has been testified that the position in the team trail
he was over five hundred feet from the gap and that he is in
good position to know what was going on as the team was within

was essential that the jury be properly instructed.

The six witnesses produced by the defendant and who testified concerning the accident were all employees of the defendant company and the court gave to the jury the following instruction:

"The Court instructs the jury that in passing upon the testimony of the witnesses the jury have a right to take into consideration any interest such witness may feel in the result of the suit, if any such interest is proved, growing out of his or her relationship to either of the parties as employees or otherwise, and to give the testimony of such witnesses only such weight as they think it is entitled to under all the facts and circumstances proved on the trial."

There were no witnesses of the plaintiff who were in his employ. Therefore this instruction referred to defendant's witnesses alone. Although the instruction contains the words "either of the parties", nevertheless from the very nature of the case, only one ^{of} the parties, the defendant, was meant.

It is always competent for the trial court to instruct the jury that they may take into consideration the fact that a witness has been shown to have an interest in the outcome of the suit. But, if a witness appears to be fair and truthful, he ought not to have his testimony discredited and subjected to suspicion, simply because he is an employee of a party to a suit. It is not necessary to elaborate upon the soundness of this assertion. An employee's testimony should be treated the same as that of any other witness. In a case of this character, where the defendant can have no other witnesses than its employees, its chance of obtaining justice must be discounted at the very beginning, if it be a rule of law that the jury may be told by the court that such witnesses are interested because they are employees. It is true that in *Donley v. Dougherty*, 174 Ill. 582, a similar instruction was held not ^{to} be a substantial or reversible error. Nevertheless the Supreme Court in *Bennett v. Chicago City Ry. Co.* 243 Ill. 420, in reviewing that case said, that it is now disposed to hold that such an instruction is not accurate and that it might be so far misleading as to require a reversal

was essential that the jury be properly instructed.
The six witnesses produced by the defendant and the plaintiff
concerning the accident were all employees of the defendant company
and the court gave to the jury the following instruction:

"The Court instructs the jury that in pass-
ing upon the testimony of the witnesses the
jury have a right to take into considera-
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terest is proved, growing out of his or
her relationship to either of the parties
as employee or otherwise, and to give
the testimony of such witnesses only such
weight as they think it is entitled to
under all the facts and circumstances
presented on the trial."

There were no witnesses of the plaintiff who were in his employ.
Therefore this instruction referred to defendant's witnesses alone.
Although the instruction contains the words "either of the parties,"
nevertheless from the very nature of the case, only one of the parties,
the defendant, was sued.

It is always competent for the trial court to instruct the
jury that they may take into consideration the fact that a witness
has been shown to have an interest in the outcome of the suit. But
if a witness appears to be fair and truthful, he ought not to have
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to elaborate upon the soundness of this assertion. An employee's
testimony should be treated the same as that of any other witness.
In a case of this character, where the defendant can have no other
witness than the employees, the chance of obtaining justice must
be safeguarded at the very beginning, if it be a rule of law that

the jury may be told by the court that such witnesses are interested,
because they are employees. It is true that in *Douglas v. Montgomery*,
151 Ill. 502, a similar instruction was held to be proper.
In *Chicago City Ry. Co. v. Ill. Ry. Co.*, 215 Ill. 400, it was held that
it is now the case so held that such an instruction is not proper.

of the judgment. The judgment in that case was not reversed because the Supreme Court said it was obvious that no harm resulted to appellant by its being given. In the instant case harm was inescapable. If the jury was warranted under the instructions of the court to depreciate the value of defendant's witnesses solely upon the ground that they were its employees, there was no way left open to the defendant to successfully contest this suit, no matter how much merit it possessed. A later expression of the views of the Supreme Court upon this subject is to be found in *Roberts v. Chicago City Ry. Co.* 262 Ill. 228, and it was there held that a motorman on a street car has no interest in the result of a suit merely because of his employment and that the giving of such an instruction is erroneous. We are bound to follow the Supreme Court in its holdings, and we do so most cheerfully, because it announces a rule which appears to us to be essential in the administration of justice and in the protection of a witness against unnecessary and unwarranted imputations and insinuations.

Complaint is also made that the court instructed the jury on behalf of the plaintiff that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to its other witnesses, the jury has reason to believe and does believe from the evidence and all facts introduced in the evidence that such other witnesses are mistaken or knowingly testified untruthfully and are not corroborated by other credible witnesses or by facts and circumstances proved on the trial. This instruction is particularly bad in consideration of the fact that the plaintiff had but one witness who testified to seeing a cross-arm fall immediately before the horses started to run away while there were several witnesses, all employees, who testified that the cross-arm did not fall until after the horses had begun running away. This instruction in our judgment ought not to be given in any case. The court properly instructed the jury as to the weight of the testimony and credibility of witnesses in the fifth instruction given for the plaintiff and the seventh instruction given on behalf of the defendant.

of the judgment. The judgment in that case was not reversed because the Supreme Court said it was obvious that no harm resulted to appellant by its being given. In the instant case harm was in-
 evitable. If the jury was warranted under the instructions of the court to appreciate the value of defendant's witnesses solely upon the ground that they were his employees, there was no way left open to the defendant to successfully contest this rule, no matter how much merit it possessed. A later expression of the views of the Supreme Court upon this subject is to be found in *Roberts v. Chicago City Ry. Co.*, 282 Ill. 222, and it was there held that a witness who is an officer or employee of the party of a suit merely because of his employment and that the giving of such an instruction is erroneous. We are bound to follow the Supreme Court in its holdings, and we do so most cheerfully, because it announces a rule which appears to us to be essential in the administration of justice and in the protection of a witness against unnecessary and unwarranted imputations and instructions. Complaint is also made that the court instructed the jury on detail of the plaintiff that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as in the instant case, the jury has reason to believe and does believe from the evidence and all facts introduced in the evidence that such witness is worthy of specially favorable treatment and are not corroborated by other credible witnesses or by facts and circumstances proved on the trial. This instruction is particularly bad inasmuch as the fact that the plaintiff had but one witness who testified to seeing a cross-arm fall immediately before the horses started to run away while there were several witnesses, all employees, who testified that the cross-arm did not fall until after the horses had begun running away. This instruction in our judgment ought not to be given in any case. The court properly instructed the jury as to the weight of the testimony

Other alleged errors are presented by counsel for defendant. We have given each of them consideration and we think no reversible error was committed upon the trial except as herein indicated and because of those errors this judgment is reversed and remanded.

Reversed and Remanded.

Other alleged errors are presented by counsel for defendant. We have given each of them consideration and we think no reversal is warranted. In the first place, the error alleged is that the trial judge refused to allow the defendant to introduce evidence of the defendant's good character. This error was committed upon the trial except as herein indicated and because of these errors this judgment is reversed and remanded.

Reversed and Remanded.

THE COURT OF APPEALS
IN AND FOR THE DISTRICT OF COLUMBIA
DOES HEREBY CERTIFY THAT THE
FOLLOWING IS A TRUE AND CORRECT
COPY OF THE OPINION OF THE
COURT AS ANNOUNCED BY THE CLERK
ON THE 10th DAY OF OCTOBER, 1911.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 27th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty five.

Justus L. Johnson
Clerk of the Appellate Court.

JOHNSON.

is, and keeper of the house

the opinion of the said Appellate Court in

remains in my hand and still the seal of
of Ottawa, this 25th day of
in the year of our Lord one thousand

15
Hearing Denied
Jan. 12, 1926

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of
April, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 647⁵

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 29 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

1800

that of the Court

Frank E. Johnson, Administrator
of the Estate of John Emmert Norman,
Deceased,

appellee,

Appeal from Circuit Court

vs.

of Winnebago County.

City of Rockford, a Municipal Corpora-
tion,

appellant,

238 I.A. 647

Jones, P. J.

Appellee recovered a judgment for \$2500 against appellant be-
cause of the death of appellee's intestate, by drowning.

The declaration charged three acts of negligence on the part of
appellant; first, that after the construction of a new bridge on
South Fifth Street in the City of Rockford, and across Keith's Creek,
it negligently and carelessly left a sidewalk in the public street,
at the end of which sidewalk there was an abrupt drop into the
creek; second, that the defendant negligently and carelessly failed
to properly guard the end of said sidewalk; and third, that the
appellant negligently and carelessly failed to place a barrier across
said sidewalk at the creek.

None of the material facts are in controversy. The undisputed
evidence shows that at one time the said creek was crossed by a
bridge substantially as wide as the street. The street runs north
and south. There was a tar and gravel sidewalk along the west side
thereof leading to the north end of the bridge in a straight line,
and connected with the bridge on its west side. Sometime before the
death of appellee's intestate a new concrete bridge was constructed,
to take the place of the old bridge. The new bridge was considerably
narrower than the old bridge, so that the west side of the said new
bridge was not in line with the sidewalk, but was east of it. The
removal of the old bridge left an abrupt drop from the walk into the
creek. A concrete walk was then built over the old tar and gravel
walk. However, the south end of this new walk did not extend to
the creek bank, but about fifty feet north of the creek. The old
tar sidewalk was left from that point down to the bank of the creek.

Frank E. Johnson, Administrator
of the Estate of John Edward Johnson,
Deceased,

Appel from Circuit Court
of Winnebago County.

appellee,

vs.

City of Rockford, a Municipal Corporation,
Appellant.

Appellant,

238 I.A. 647

June 1, 1911.

Appellee recovered a judgment for \$2800 against appellant be-

cause of the death of appellee's intestate, by drowning.

The declaration charged three acts of negligence on the part of

appellant; first, that after the construction of a new bridge on

North Fifth Street in the City of Rockford, and across Keith's Creek,

it negligently and carelessly left a sidewalk in the public street,

at the end of which sidewalk there was an abrupt drop into the

creek; second, that the defendant negligently and carelessly failed

to properly guard the end of said sidewalk; and third, that the

appellant negligently and carelessly failed to place a barrier across

said sidewalk at the creek.

None of the material facts are in controversy. The material

evidence shows that at the time the said creek was crossed by a

bridge substantially as wide as the street. The street was wide

and south. There was a bar and gravel sidewalk along the west side

thereof leading to the north end of the bridge in a straight line,

and connected with the bridge on its west side. Sometime before the

death of appellee's intestate a new concrete bridge was constructed,

to take the place of the old bridge. The new bridge was considerably

narrower than the old bridge, so that the west side of the said new

bridge was not in line with the sidewalk, but was east of it. The

removal of the old bridge left an abrupt drop from the walk into the

creek. A concrete walk was then built over the old bar and gravel

walk. However, the south end of this new walk did not extend to

A cinder walk was laid from the end of the concrete walk in a diagonal direction to the new bridge. No barrier was placed across the tar walk, at or near the creek, but a fence was built from a point just east of the walk to a point at or near the new bridge. This fence or barrier was constructed of four by four posts set in the ground. The posts stood about three and one half to four feet above the surface. On top of them was nailed another four by four timber. Between this timber and the surface of the ground a stringer of planks was nailed to the posts. The first or lower stringer was about fourteen inches from the surface of the ground and the second stringer was about the same distance above the first.

On February 22, 1922, John Emmert Norman was about five and one-half years of age. He lived with his grandparents not very far from the creek. He had returned that day from Chicago, where he had been on a visit with his grandmother. Shortly after his return he took his coaster-wagon and went out to play. He proceeded to a vacant lot near the bridge, where several other children were at play. The witness, Walter Ruse, saw him go south along the new sidewalk and then on to the old tar sidewalk to a point eight or ten feet from the end, where he left his wagon. He then departed from the tar sidewalk and went in a southeasterly direction, to the board fence. Ruse saw him crawl under the fence, but neither Ruse nor anyone else saw him fall into the creek. There had been heavy rains, the water in the creek was about nine feet deep and was only a foot or a foot and a half below the bridge. The drowning occurred about five o'clock in the afternoon and the boy's body was found some distance down the creek the next morning.

It will be seen from what has already been said that the declaration charges that the boy was drowned because of the negligent failure of the city to construct and maintain a barrier or guard across the old tar walk and by reason of such failure the boy proceeded along the walk to the end of it, where he fell into the creek and was drowned.

There is no evidence in the record to sustain the charges of

A chain was laid from the end of the bridge to the
distant bridge to the new bridge. No barrier was placed across
the old walk, at or near the creek, but a fence was built from a
point just east of the walk to a point at or near the new bridge.
This fence or barrier was constructed of four by four posts set in
the ground. The posts stood about three and one half to four feet
above the surface. On top of them was nailed another four by four
timber. Between this timber and the surface of the ground a series
of planks was nailed to the posts. The first or lower stringer
was about four feet in length from the surface of the ground and the
second stringer was about the same distance above the first.
On February 23, 1923, John Hammett Norman was about five and one-
half years of age. He lived with his grandparents and very far from
the creek. He had noticed that the creek was very low, where he had seen
the water with his grandmother. Shortly after his return he told
his mother that the creek was very low. He proposed to go down
to see the bridge, where several other children were at play.
The witness, Walter Kane, saw him go south along the new sidewalk
and then on to the old sidewalk to a point eight or ten feet from
the end, where he left his bag. He then departed from the tax
sidewalk and went in a southeasterly direction, to the board fence.
When he saw his great-grandmother, he called out to her, and she
saw him fall into the creek. There had been heavy rain, the water
in the creek was about nine feet deep and was only a foot or a foot
and a half below the bridge. The drowning occurred about five
miles in the afternoon and the boy's body was found some distance
from the creek the next morning.
It will be seen from this that the witness had been told
that the boy was drowned because of the negligence of
one of the city's contractors and missed a chance of making money
the old tax walk and by reason of which the boy was drowned
along the walk to the end of it, where he fell into the creek and
was drowned.

the declaration. The proof shows that appellee's intestate did not fall into the creek at the place averred in the declaration, but fell into it at another point; a point several feet east of the sidewalk. It is obvious that the failure to construct a barrier across the sidewalk had nothing whatever to do with the accident. It was neither the proximate nor the remote cause of the drowning. Had there been a solid stone wall at the end of the walk, it would not have prevented the accident. It was therefore the duty of the trial court to have allowed the motion of the defendant city for an instructed verdict in its behalf.

This cause is accordingly reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

JOHNSON.

There is a true copy of the opinion of
the office.

Respectfully,
J. Johnson

7367

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 648

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 10 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Tillman Anderson, Appellee,

v.

Appeal from the
Circuit Court
of Grundy County.

Thomas T. Fletcher, Appellant.

238 I.A. 648

Jones, P.J.

This is an appeal from the circuit court of Grundy County in an action on the case for malicious prosecution, brought by Tillman Anderson, appellee, against Thomas T. Fletcher, appellant. The facts have been fully set forth in the opinion of this court when the matter was before us on a former appeal, reported in 228 Ill. App. 372, and it is unnecessary to repeat them. This case has been here twice before and each time the judgment was reversed and remanded because of an excessive verdict. After the second reversal, the cause was again tried in the circuit court, and a verdict returned for appellee for \$4500. A motion for a new trial was denied and this appeal followed. The record is voluminous and many errors are assigned by appellant. He first claims that the trial court admitted in evidence the transcript of the proceedings in the criminal case against appellee, without proper limitation of its effect and purpose. When it was offered by appellee's counsel, he stated that it was limited for the purpose of showing the termination of that suit, and, in admitting it, the court expressly limited it for that purpose and the jury were instructed by the court not to consider it for any other purpose. The cases cited by appellant are distinguishable from the case before us. They are cases where there was no attempt to limit the offer for the purpose of showing the termination of the previous suit. Appellant also complains of a remark by appellee's counsel later in the trial, that the transcript admitted showed the arraignment. Appellant made no objection or exception to the remark of appellee's counsel and he cannot now be heard here to do so for the first time.

Complaint is made because the court admitted in evidence the complaint referred to in the third count of the declaration, the contention being that there was no showing that it had been signed by

Appeal from the
Circuit Court
of Grand County.

William Anderson, Appellee,

Thomas T. Fletcher, Appellant.

2381.A.648

James, P. J.

This is an appeal from the circuit court of Grand County in

an action on the case for malicious prosecution, brought by William

Anderson, appellee, against Thomas T. Fletcher, appellant. The facts

have been fully set forth in the opinion of this court when the matter

was before us on a former appeal, reported in 238 Ill. App. 373, and it

is unnecessary to repeat them. This case has been here twice before

and each time the judgment was reversed and remanded because of an excessive

verdict. After the second reversal, the cause was again tried in the

circuit court, and a verdict returned for appellee for \$4500. A motion

for a new trial was denied and this appeal followed. The record is

voluminous and many errors are assigned by appellant. He first claims

that the trial court admitted in evidence the transcript of the pro-

ceedings in the criminal case against appellee, without proper limita-

tion of its effect and purpose. When it was offered by appellee's

counsel, he stated that it was limited for the purpose of showing the

circumstances of that suit, and, in admitting it, the court expressly

limited it for that purpose and the jury were instructed by the court

not to consider it for any other purpose. The cases cited by appellant

are distinguishable from the case before us. They are cases where

there was no attempt to limit the offer for the purpose of showing the

circumstances of the previous suit. Appellant also complains of a

verdict by appellee's counsel later in the trial, that the transcript

admitted showed the arraignment. Appellant made no objection or ex-

ception to the remark of appellee's counsel and he cannot now be

heard here to so far the first time.

Complaint is made because the court admitted in evidence the

appellant and that all the evidence was that it was not signed by him or ever called to his attention. In this connection appellant claims it is stipulated that the exhibit is in the handwriting of Oliver Buckhard, State's Attorney, with the exception that the signature in the left hand corner is in the handwriting of B. A. Cotton, the Justice of the Peace who issued the warrant in the criminal case. Cotton subsequently died so that his evidence was not available. The stipulation related only to the body of the instrument, and the signature, in the left hand corner, of the Justice of the Peace. While appellant testified on the last trial that he did not sign the particular complaint and other witnesses testified that the signature was not in his handwriting, appellant admitted, on cross examination when asked if he did not testify at the former trial "Yes, that is my signature," that he presumed he did. The exhibit was identified by the Deputy Circuit Clerk as a part of the files of that office in the case of The People v. Tillman Anderson, the Justice's signature to the jurat on the complaint was proven by his successor in office, and page 14 of the Justice's docket shows appellant was charged with larceny. There is always a presumption that official acts or duties have been properly performed and in general it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty, was legally done, whether prior to the act, such as giving notice, or determining the existence of conditions prescribed as a prerequisite to legal action or subsequent to such act. (22 C.J. Evidence Sec. 69.) In view of all the circumstances it can hardly be seriously contended that it was error to admit the document in evidence for what it was worth.

Appellant complains of the admission of the testimony of R. F. Booth, concerning the dispute between Booth and appellant in December 1914, over the acreage of the farm sold by Booth to appellant. The whole controversy out of which this suit grew arose by reason of the disputes between Booth and appellant concerning the farm sale, and they were still unsettled at the time of appellee's arrest. The case of

and that all the evidence was that it was not signed by him
called to his attention. In this connection appellant claims
that the exhibit is in the handwriting of Oliver
Stattin, Attorney, with the exception that the signature in
the left hand corner is in the handwriting of A. A. Cotton, the
Peace who issued the warrant in the criminal case. Cotton
apparently also so that his evidence was not available. The stip-
ulation related only to the body of the instrument, and the signature
in the left hand corner, of the Justice of the Peace. While appellant
testified on the last trial that he did not sign the particular complaint
and other witnesses testified that the signature was not in his hand-
writing, appellant admitted, on cross examination when asked if he
did not testify at the former trial "Yes, that is my signature," that
the exhibit was identified by the Deputy Circuit
Judge as a part of the files of that office in the case of The People
v. William Anderson, the Justice's signature to the Just on the com-
plaint was proven by his successor in office, and page 14 of the
Justice's docket shows appellant was charged with larceny. There is
always a presumption that official acts or duties have been properly
performed and in general it is to be presumed that everything done by
an official in connection with the performance of an official act in
the line of his duty, was legally done, whether prior to the act, such
as giving notice, or determining the existence of conditions presented
as a prerequisite to legal action or subsequent to such act. (22 C.2.
§ 69.) In view of all the circumstances it can hardly be
contended that it was error to admit the document in evidence
and that it was worth.

Appellant complains of the admission of the testimony of R. F.
Booth, concerning the dispute between Booth and appellant in December
1911, over the acreage of the farm sold by Booth to appellant. The
controversy out of which this suit grew arose by reason of the
dispute between Booth and appellant concerning the farm sale, and that

3.

Horne v. Sullivan, 83 Ill. 30, cited by appellant wherein it was held that evidence of a difficulty in which the defendant's wife had been concerned, or respecting her character or that of his son for peace and quietness was inadmissible, has no application to the facts in this record. When exhibit 29 and 29a, being a letter to Booth from appellant's counsel dated February 24, 1915, and which in part concerned the dispute as to the acreage, was offered in evidence, appellant's counsel stated "no objection to it." Nor was any objection raised by appellant to Booth's testimony concerning the dispute between them on February 28, 1915, and in March, 1915, but it is now contended by appellant that the testimony of Booth concerning the alleged dispute on February 28, 1915, was prejudicial to appellant and improper. There is a long paragraph in the abstract purporting to set out this conversation as testified to by Booth. Among other things the dispute as to the acreage is embraced in it, as well as a statement that appellant accused Booth of agreeing to give some extra acreage to Charles Fletcher. Upon Booth's being asked if he had agreed to give or sell Charles Fletcher any portion of the farm he answered "No." Appellant moved to strike out this answer but did not object to the remainder of the conversation. The abstract would indicate that the motion was to strike out all the testimony, but the record shows otherwise. Another conversation between Booth and appellant in March following in which the acreage was also mentioned, was testified to by the witness Booth. The only other motion of appellant to strike any portion of this testimony was sustained, because the word "tendered", used by the witness, was held to state a conclusion. Appellant also complains of the admission of the testimony of Charles Fletcher, concerning the conversation on February 28, 1915, between Booth and appellant. Although appellant objected to this testimony of Fletcher, it is substantially the same as that of the witness Booth. Under all the circumstances, we think there was no reversible error in the admission of this testimony.

There is no ground for the complaint against the admission of appellee's exhibits 22, 23 and 30 in evidence, because the record shows that in each case appellant's counsel stated there was no objection.

... V. MILLER, 22 Ill. 2d, cited by appellant therein it was held
that evidence of a difference in color between the appellant's wife and
appellant, or the color of the appellant's hair, is not admissible
in evidence. It is inadmissible, and no reference to the fact in this
case. When asked if she was, being a witness to the fact that
the appellant dated February 21, 1911, was asked in the court
house as to the answer, was asked in evidence, appellant's counsel
asked "an objection to it." But was not objection taken by
appellant's counsel. The record shows that on February
21, 1911, and in March, 1911, but it is now amended by appellant
that the testimony of Booth concerning the alleged facts in February
21, 1911, was prejudicial to appellant and improper. There is a law
in the State of Illinois that no one can be a witness in
a case to which he is a party. In the case of Booth, the witness
was called to by Booth. In the other cases the witness as to the
facts in it, as well as a statement that appellant was
called to give some other evidence to Charles Fletcher. Upon
Booth's trial, asked if he had agreed to give or sell Charles Fletcher
any portion of the farm he answered "No." Appellant's counsel
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February 21, 1911, between Booth and appellant. Although appellant
objected to this testimony of Fletcher, it is substantially the same
as that of the witness Booth. Under all the circumstances, we think
there was no reversible error in the admission of this testimony.

Appellant further claims that it was error to permit one of ~~the~~ appellee's counsel to testify after a rule had been entered excluding witnesses and while other counsel also represented him. The record shows that the trial started on Wednesday, November 14th, and that the testimony complained of was given on Saturday, November 17th, but that it was not contemplated that he would testify until the night before he did so. *Eshelman v. Rawalt* 298 Ill. 192, cited by appellant, holds that it is not proper practice for an attorney connected with a case to appear as a witness, but that it is not unlawful. In *Smith v. Young* 179 Ill. App. 364, it is held not to be error for the court, in its discretion, to permit an attorney of record in a case to testify, though witnesses were excluded from the courtroom, especially where it does not appear that it was known when the motion to exclude was made that such attorney would become a material witness. The rule as to including all witnesses in the excluding order is inapplicable to an attorney for one of the parties even though he is also represented on the trial by other attorneys. (26 R.C.L. Trial, Sec 66.)

It is contended ~~that~~ the court erred in refusing to admit appellant's exhibit 2 in evidence, being a carbon copy of a letter alleged to have been written on September 28, 1916, to R.F.Booth by appellant's attorney and claimed to be proper evidence showing advice of counsel. If the copy of the letter was otherwise admissible, no proper foundation was laid for its admission. Notice had been served by appellant on appellee's counsel to produce the original, but no showing was made that counsel ever had the letter or its control or knew anything about it, or that appellant was in any way connected with it. No effort was made to show that a subpoena duces tecum was issued or served on Booth to produce it, nor any effort made to show that appellant could not secure it from Booth.

All the pleadings in the specific performance suit between appellant and Booth were admitted in evidence without objection by appellant. We have failed to find in the record any objection by appellant to the argument of appellee's counsel relating to the specific perfor-

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arrived in court to produce it, nor any effort made to show that appellant
could not secure it from Booth.

All the pleadings in the specific performance suit between
appellee and appellant were admitted in evidence without objection by ap-
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5.

mance suit, and appellant's claim of misconduct by appellee's counsel in this regard was waived by appellant not objecting at the proper time. Appellant complains also that appellee's counsel in the argument asked for a verdict of \$10,000 when a former judgment of \$7500 was reversed as excessive. This was improper but appellant made no objection nor preserved any exception thereto, and the question cannot be raised in this court for the first time. (Anderson v. Fletcher, 228 Ill. App. 372 P. 384.) Appellant also charges that appellee's counsel seated appellee's father, mother and two sisters inside the bar rail in a semi-circle in front of the jury after the argument of appellant's counsel had closed, and claims that this was misconduct of appellee's counsel. While the practice of exhibiting the family of one of the parties in the trial of a jury case is not to be approved and upon suggestion to the trial Judge, will be properly controlled, still the record shows that the family of ~~one of the parties~~ was brought in while the jury was absent, and when the situation was brought to the attention of the court through objection by appellant, all members of appellee's family, except his father, were required to leave the space within the bar. Under some circumstances this might constitute reversible error, but we do not feel that the verdict in this case was influenced by it.

Appellant contends that the court instructed the jury orally. The provision of the statute that an instruction given by the court of its own motion must be in writing, applied only to instructions given at the close of the argument and not to what the court may say during the progress of the trial in calling the attention of the jury to the purpose for which certain evidence is admitted, for such remarks, strictly speaking, are not instructions. (14 R.D.L. Sec. 34) The court may orally instruct the jury to disregard improper remarks of counsel or of a witness to which objection has been made (38 Cyc.1766).

The court did not err in overruling appellant's motion to withdraw a juror and continue the case. Withdrawing a juror is usually, if not uniformly, a matter resting in the sound discretion of the trial

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counsel or of a witness to which objection has been made (Ill. Stat.,
The court did not give any instruction regarding the matter in ques-
tion and cannot be held in error therefor.

court, and a refusal to permit a juror to be withdrawn cannot ordinarily be assigned for error. (Morrison v. Hedenberg 138 Ill. 22 P. 29.)

The giving of plaintiff's instructions 1, 11 and 15 and the refusal of defendant's instructions 2, 4, 6, 8, 9 and 10 are assigned as error by appellant but not pressed. The pleadings are the same as on the former trials of this case, and we have already passed upon the points raised by those instructions in former appeals.

Appellee's fourth instruction given is as follows: "The court instructs the jury that if you believe from the evidence, and circumstances as given in evidence, that the defendant had not probable cause for the prosecution, you may infer malice from said want of probable cause, if the evidence warrants you in doing so." The instruction does not tell the jury the law presumes malice in such case, as contended by appellant, and the instruction is not mandatory, but permissive, "if the evidence warrants" it. Instructions in almost precisely the same language were approved in Chapman v Cawrey 50 Ill. 512 and Roy v. Goings 112 Ill. 656. That the instruction correctly states the law has been held in numerous other cases.

Appellee's fourteenth instruction given is as follows: "The court instructs the jury that before the defendant is entitled to set up as a defense to this action that he sought the advice of counsel, he must show that the advice of counsel, if any, was given upon a full, fair and honest statement of all the facts known to the defendant and that such advice was honestly given by the attorney or so understood by the defendant, but if the defendant withheld or failed to disclose material facts known to him which were favorable to the plaintiff, then the advice of counsel would be no defense to him in this action." Appellant claims the instruction requires a full statement of facts, some of which might be unknown to the defendant. We do not so view the language. It requires a full, fair and honest statement of all the facts known to the defendant and the word "full" applied as much to the facts known to the defendant, as the words "fair and honest." It is well settled that to constitute a defense the advice of counsel must be upon a full fair and honest statement of all the facts known to the defendant.

...and a refusal to permit a party to be withdrawn without notice
...it is assigned for error. (Horton v. Horton, 111 Ill. 2d 111.)
...The giving of plaintiff's instructions 1, 11 and 12 and the
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(Roy v. Goings, 112 Ill. 656, p. 663; Neufeld v. Rodeminski 144 Ill. 83, pages 87 and 88, and cases cited.) The second criticism of the instruction is directed against the language "and that such advice was honestly given". The language of that clause, as given in the instruction, amounts to requiring the advice of counsel to have been sought and acted upon in good faith. Advice of counsel is a complete defense when the prosecution is instituted in reliance in good faith on such advice given after a full and fair statement to the attorney of all the facts. (18 R.C.L. Mal. Pros. Sec. 27.) In order to enable a party to base a defense upon the advice of counsel given he should, in perfect good faith, obtain the counsel and advice of a competent and reliable attorney. (Davie v. Wisher 72 Ill. 262, p. 264; Ross v. Innis 26 Ill. 259, p. 279.) If he resorted to this contrivance to cover up his malice and to protect himself from its consequences, knowing and believing all the time that no offense had been committed, then indeed, he was even more guilty for having taken the course he did. (Ross v. Innis, supra.)

Appellant also claims that appellee's given instruction No. 9 tells the jury they might disregard every syllable of testimony and every particle of documentary evidence which might tend to prove the want of malice on the part of the complaining witness, but we do not so regard it. The concluding sentence of the instruction is "Whether in this case the proceeding was commenced against the plaintiff with a bona fide intention of prosecuting a supposed criminal offense or solely for the purpose of securing a private claim are questions to be determined by the jury, from the evidence." It is apparent that the real objection of appellant is to the statement in the instruction that the commencement of a criminal prosecution simply and solely for the purpose of enforcing a civil right or contract is an abuse of process and would be conclusive evidence of malice. The law is that the prosecution of a person with any other motive than that of bringing a guilty party to justice is a malicious prosecution in law. (Krug v. Ward 77

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Appellant also claims that appellee's given testimony ...
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...of witness in the part of the examination witness, but we do not ...
...it. The controlling question in this case is whether ...
...the proceeding was commenced against the plaintiff with a ...
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Ill. 603, p. 608; 38 C.J. Mal. Pros. Sec. 67; Glenn v. Lawrence 280 Ill. 581, p. 587; McElroy v. The Catholic Press Company 254 Ill. 290, p. 293.) We do not regard the giving of the instruction as error.

It is also claimed that there was error in refusing to give defendant's refused instruction No. 1. Instructions 8 and 9 given at appellant's instance substantially cover the same proposition and he cannot complain of the refusal. Appellant's refused instructions 3 and 7 and are covered by other instructions given at his instance.

Appellant complains of the misconduct of appellee's counsel in the argument of the case. We are of the opinion that appellee's argument contained much that was highly improper and prejudicial but appellant made only two objections to anything said by appellee's counsel. No ruling of the court was made nor insisted upon by appellant when his first objection was made and his only other objection was sustained by the court and no prejudice resulted.

It is further urged that the court erred in not giving appellant's offered peremptory instruction. Without entering into a review of the evidence we think there is enough evidence of malice and want of probable cause in the record to support a verdict. The jury undoubtedly found and assessed a large part of the amount of their verdict as punitive damages, but inasmuch as three juries have found the facts the same way, it seems to be eminently proper that there should be an end to the controversy so far as the facts are concerned. Upon each trial the issues of fact involved were practically the same and the evidence adduced was substantially alike. In the first appeal of this cause we reversed, as grossly excessive, a judgment for \$7500 entered after \$2500 was remitted from a verdict for \$10,000; and on the second appeal a judgment for \$15,000 was likewise reversed. While an excessive judgment will be reversed if it appears probable from the amount of the judgment that the jury has acted under the influence of passion or prejudice, the amount of damages is a question for the jury. We have no way of ascertaining what part of the verdict was assessed by the jury as punitive damages, but in view of all the evidence and the wealth of

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9.

appellant as shown by the record, we cannot say that the judgment for \$4500 is ~~as~~ grossly excessive as to require a reversal. If the trial judge had, in the progress of this litigation, granted two new trials because of the excessive amount of the verdict in each trial, then under Sec. 77 of the Practice Act no further new trial could be granted for that reason. It is the policy of the law to discourage litigation and to settle controversies, and while we think there are numerous errors in the record, some of them prejudicial to appellant's rights, yet proper objection was not made, nor exception preserved in most of such instances. From the history of this case it is improbable that another jury would greatly reduce the amount of damages and we cannot say that substantial justice has not been done. It is more important in the administration of justice that litigation ~~xxxxx~~ should end in the attainment of substantial justice than that a record of the proceedings should be built up which is without flaw or blemish. (West Chicago Street Ry. Co. v. Maday, 108 Ill. 308, p. 310.)

The judgment of the circuit court will be affirmed.

Judgment Affirmed.

1. The first question is whether the instruction is correct in its statement of the law. The law is that the prosecution must establish a prima facie case of guilt before the jury can be asked to return a verdict of guilty. This is the standard instruction in every criminal case. The instruction in this case is correct in its statement of the law.

2. The second question is whether the instruction is correct in its statement of the facts. The facts are that the defendant was charged with the murder of a woman. The instruction in this case is correct in its statement of the facts.

3. The third question is whether the instruction is correct in its statement of the evidence. The evidence is that the defendant was seen at the scene of the crime. The instruction in this case is correct in its statement of the evidence.

4. The fourth question is whether the instruction is correct in its statement of the law and the facts and the evidence. The instruction in this case is correct in its statement of the law and the facts and the evidence.

5. The fifth question is whether the instruction is correct in its statement of the law and the facts and the evidence and the jury's verdict. The instruction in this case is correct in its statement of the law and the facts and the evidence and the jury's verdict.

Ill. 603, p. 608; 38 C.J. Mal. Pros. Sec. 67; Glenn v. Lawrence 280 Ill. 581, p. 587; McElroy v. The Catholic Press Company 254 Ill. 290, p. 293.) We do not regard the giving of the instruction as error.

It is also claimed that there was error in refusing to give defendant's refused instruction No. 1. Instructions 8 and 9 given at appellant's instance substantially cover the same proposition and he cannot complain of the refusal. Appellant's refused instructions 3 and 7 and are covered by other instructions given at his instance.

Appellant complains of the misconduct of appellee's counsel in the argument of the case. We are of the opinion that appellee's argument contained much that was highly improper and prejudicial but appellant made only two objections to anything said by appellee's counsel. No ruling of the court was made nor insisted upon by appellant when his first objection was made and his only other objection was sustained by the court and no prejudice resulted.

It is further urged that the court erred in not giving appellant's offered peremptory instruction. Without entering into a review of the evidence we think there is enough evidence of malice and want of probable cause in the record to support a verdict. The jury undoubtedly found and assessed a large part of the amount of their verdict as punitive damages, but inasmuch as three juries have found the facts the same way, it seems to be eminently proper that there should be an end to the controversy so far as the facts are concerned. Upon each trial the issues of fact involved were practically the same and the evidence adduced was substantially alike. In the first appeal of this cause we reversed, as grossly excessive, a judgment for \$7500 entered after \$2500 was remitted from a verdict for \$10,000; and on the second appeal a judgment for \$15,000 was likewise reversed. While an excessive judgment will be reversed if it appears probable from the amount of the judgment that the jury has acted under the influence of passion or prejudice, the amount of damages is a question for the jury. We have no way of ascertaining what part of the verdict was assessed by the jury as punitive damages, but in view of all the evidence and the wealth of

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appellant as shown by the record, we cannot say that the judgment for \$4500 is ~~so~~ grossly excessive as to require a reversal. If the trial judge had, in the progress of this litigation, granted two new trials because of the excessive amount of the verdict in each trial, then under Sec. 77 of the Practice Act no further new trial could be granted for that reason. It is the policy of the law to discourage litigation and to settle controversies, and while we think there are numerous errors in the record, some of them prejudicial to appellant's rights, yet proper objection was not made, nor exception preserved in most of such instances. From the history of this case it is improbable that another jury would greatly reduce the amount of damages and we cannot say that substantial justice has not been done. It is more important in the administration of justice that litigation ~~must~~ should end in the attainment of substantial justice than that a record of the proceedings should be built up which is without flaw or blemish. (West Chicago Street Ry. Co. v. Maday, 108 Ill. 308, p. 310.)

The judgment of the circuit court will be affirmed.

Judgment Affirmed.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 18th day of
Nov. in the year of our Lord one thousand
nine hundred and twenty-five.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk of the
the State of Illinois, and keeper of the
is a true copy of the opinion in the said
in my office.

Wm. J. Whetzel, I hereto certify that
Appellate Court at St. Louis.

and is the true and correct copy of the

Wm. J. Whetzel

Rehearing Denied
Jan. 12, 1926
abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 648²

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 16 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



J. B. T. 1877

EMERSON

Herman A. Stanhope
Appellant,

Appeal from Circuit Court
of Peoria County.

vs.

Archib C. Maple
Appellee.

238 I.A. 648

Jones, P. J.:

This is an appeal from the Circuit Court of Peoria County. Appellant began suit against appellee on a declaration containing three counts. The first count charges that appellant was possessed of ^acertain automobile; that appellee falsely represented to appellant that he was the owner and holder of a valid first chattel mortgage on the automobile; that, if appellant would turn over the automobile to appellee, he would procure the release of another subsequent chattel mortgage made by appellant to the Federal Investment Company, and that appellant, relying upon such representations, turned the automobile over to appellee. The second count is the same except it omits any averment as to the alleged promise to procure the release of the second mortgage. The third count alleges a casual loss and conversion of the automobile.

The evidence shows that one Joseph R. Johnston was the owner of the automobile in question on March 14th, 1924, on which date he mortgaged it to M. & S. Investment Company, for \$1124.39. Johnston sold the automobile to appellant for \$1050.00 on July 3rd, 1924, the purchase money being paid by the Federal Investment Company to Johnston, to secure which appellant on the same day executed a chattel mortgage on the automobile to the Federal Investment Company, the note being signed by appellant and his wife. On or about July 19th, 1924, upon appellee's demand, appellant turned the automobile over to him, and it was sold to ~~appellee~~ under foreclosure of the mortgage made by Johnston to M. & S. Investment Company. Notice and report of sale were given as by law required. The Federal Investment Company took judgment by

of Peoria County.

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SECRET

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...to the ... of the ...

[illegible]

There are no automobiles; that, if applicant would turn over the automobile to appellee, he would receive the vehicle in question and

It omits any averment as to the alleged promise to procure the re-
turn of automobile over to appellee. The second count is the same except

...the second mortgage. The third count alleges a second mortgage.

The evidence shows that one Joseph R. Johnston was the owner

of the automobile in question on March 14th, 1934, on which date he

1. The first group of people who were arrested in the city of Moscow in 1937 were the members of the "Left Opposition" who had been active in the 1920s and 1930s. They were accused of being "enemies of the people" and of having plotted to overthrow the government. They were sentenced to long terms of imprisonment or execution.

On or about July 1954, 1954, when

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the activities of the Chinese Nationalist Government in the United States.

For more information contact:

2.

Confession on their note against appellant and his wife on July 22nd, 1929.

The declaration is based upon the theory that appellee fraudulently got possession of the automobile by representing that he was the holder of a chattel mortgage which was a valid lien; that as such holder he was entitled to possession; that he would procure the release of the second mortgage and that all of such representations were false and untrue. Several grounds are urged for reversal. The evidence shows that appellee, Maple, and David M. Smith were formerly partners and conducted their business under the firm name of the "M. & S. Investment Company", but that at the time the mortgage was made by Johnson^x, appellee was the sole owner of the business and continued to conduct it under the name of "M. & S. Investment Company". The contention of appellant that the mortgage was valid because the name of the grantee is a fictitious one is without merit. A bill of sale or a mortgage of personal property, to or by a partnership in its firm style is as valid and effective as though made to or by an individual in his proper name (30 Cyc. 420.) The note was endorsed in blank by the M. & S. Investment Company, and the notices given and report of sale made, were signed "M. & S. Investment Company for the use of Frank Avery, by A. C. Maple, their agent." Appellee claims he sold the note and mortgage to the said Frank Avery and that in taking possession of the property and advertising it for sale, he was acting as the agent of Avery.

At the sale appellee was the highest bidder and the car was sold to him. It is claimed that such sale is therefore void. Under the circumstances, the utmost good faith was required of appellee in making the sale and we have carefully examined the record to see if he exercised it. We have failed to find anything which tends to show that he did not fairly conduct the sale or that he did not realize all he could for the property.

It is further contended by appellant that the mortgage to M. & S. Investment Company is invalid because of a defective acknow-

possession on their own account and his wife on July 28th, 1924.

The assertion is based upon the theory that appellee fraudulently got possession of the automobile by representing that he was the holder of a chattel mortgage which was a valid lien; that as such holder he was entitled to possession; that he would procure the release of the second mortgage and that all of such representations were false and untrue. Several grounds are urged for reversal. The evidence shows that appellee, Ralph, and David M. Smith were

formerly partners and conducted their business under the firm name of the "M. & S. Investment Company", but that at the time the mortgage was made by appellee, appellee was the sole owner of the business and continued to conduct it under the name of "M. & S. Investment Company".

The contention of appellant that the mortgage was valid because the name of the grantee is a fictitious one is without merit. A bill of sale or a mortgage of personal property, to or by a partnership in its true name is as valid and effective as though made to or by an individual in his proper name (30 Cyc. 420). The note was endorsed in blank by the M. & S. Investment Company, and the notes given and

report of sale made, were signed "M. & S. Investment Company for the use of Frank Avery, by A. C. Ralph, their agent." Appellee states he sold the note and mortgage to the said Frank Avery and that in selling possession of the property and advertising it for sale, he was acting as the agent of Avery.

At the sale appellee was the highest bidder and the property sold to him. It is claimed that such sale is therefore void. Under the circumstances, the utmost good faith was required of appellee in making the sale and we have carefully examined the record to see if he exercised it. We have failed to find anything which tends to show that he did not fairly conduct the sale or that in any way he could for the property.

It is further contended by appellant that the mortgage is

3.

ledgment. The acknowledgment appears to have been by an attorney in fact. On the back of the mortgage is a power of attorney to H. M. Roberts to acknowledge the execution of the mortgage. It does not designate by name the Justice of the Peace before whom such acknowledgment should be made. It is claimed by appellant that the power of attorney is for that reason insufficient. Sec. 2, Chap. 95, Smith-Hurd Statutes, prescribes the form of the power of attorney, as well as the certificate of acknowledgment, in cases where the acknowledgment is made by an attorney in fact. We think the statute has been substantially complied with, both as to the form of the power of attorney and the certificate of the justice of the peace. But, whatever may be said of the alleged defects, they were not such as would invalidate the mortgage between the original parties, (Chipron v. Feikert, 68 Ill. 284; Frank v Miner, 50 Ill. 444.) And so with a subsequent purchaser who is advised of the existence of a mortgage on his property and who surrenders it without objection to the mortgagee because of condition broken.

Appellant however claims that appellee agreed to procure the release of the second mortgage given by appellant if he would turn over the automobile to appellee. Appellant is the only witness who so testified and he is contradicted by appellee and another witness, who is apparently disinterested. The jury found against the contention of appellant and we would not be justified in disturbing their finding.

Complaint is also made of certain instructions given and refused by the trial court, but no authorities are cited in support of appellant's contentions, and we find no error in the rulings of the court on any of them.

Within a few days after appellee had taken possession of the mortgaged property the Federal Investment Company, the holder of the second mortgage, took judgment by confession on its note against appellant and his wife. They filed a motion to vacate the judgment, supported by their affidavit, stating that there was no consideration for the judgment note, because the automobile was not the property of_f²

judgment. The acknowledgment appears to have been by an attorney in

fact. On the face of the mortgage is a power of attorney to H. M. Roberts to acknowledge the execution of the mortgage. It does not

testimate by name the Justice of the Peace before whom such acknowledgment should be made. It is claimed by appellant that the power of

attorney is for that reason insufficient. Sec. 2, Chap. 25, Smith's New Statutes, prescribes the form of the power of attorney, as well

as the certificate of acknowledgment, in cases where the acknowledgment is made by an attorney in fact. We think the statute has been sub-

stantially complied with, both as to the form of the power of attorney and the certificate of the Justice of the Peace. But, whatever may

be said of the alleged defects, they were not such as would invalidate the mortgage between the original parties. (Chipson v. Peckart, 68 Ill.

284; Frank v. Miner, 50 Ill. 444.) And so with a subsequent purchaser who is advised of the existence of a mortgage on his property and who

acquires it without objection to the mortgage because of condition. It is said to be void and defective.

Appellant however claims that appellee agreed to procure the release of the second mortgage given by appellant if he would turn

over the automobile to appellee. Appellant is the only witness to no testimony and he is contradicted by appellee and another witness, who

is apparently disinterested. The jury found against the contention of appellant and we would not be justified in disturbing their finding.

Complaint is also made of certain instructions given and refused by the trial court, but no authorities are cited in support

of appellant's contentions, and we find no error in the rulings of the court on any of them.

Within a few days after appellee had taken possession of the mortgaged property the Federal Investment Company, the holder of the

second mortgage, took judgment by confession on its note against appellant and his wife. They filed a motion to vacate the judgment,

4.

Joseph R. Johnston, being in fact the property of the M. & S. Investment Company, by reason of the chattel mortgage given to the M. & S. Investment Company on March 14th, 1924, recorded in Book 199, page 236, showing an indebtedness of \$1124.39 due and owing to said M. & S. Investment Company; that the automobile was then in the possession of the M. & S. Investment Company by reason of their prior claim. These solemn declarations made under oath are inconsistent with appellant's claim in this proceeding. The Johnston mortgage was of record when appellant purchased the automobile; it was acknowledged substantially as required by statute and was a valid lien on the automobile when appellant purchased it. We find no reversible error in the record and the judgment of the circuit court will be affirmed.

Judgment affirmed.

...the automobile when appellant purchased it. We find no reversible error in the record and the judgment of the circuit court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
Mar, in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court.

STUART L. JOHNSON, Clerk of the Appellate
Illinois, and keeper of the Records and
of the opinion of the said Appellate

Witness my hand

Rehearing Denied
Jan 14, 1926
abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 648³

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 10 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

102103

RECEIVED

7405

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ROLLIN WALLINGFORD,

Appellant

vs

JOHN L. SMILEY,

Appellee

Appeal from the
Circuit Court of
Iroquois County.

Jett, J.

238 I.A. 648

Rollin Wallingford, appellant, instituted this suit in the Circuit Court of Iroquois County against John L. Smiley, appellee, to recover damages for an injury she claims to have received on August 1st, 1923 when she was riding in an automobile owned and operated by appellee who was hired by appellant to take her from place to place in the discharge of her business as a saleslady.

A jury trial was had and a finding in favor of appellee; a motion for a new trial having been denied judgment was rendered on the verdict and appellant prosecutes this appeal.

For the purposes of this opinion the appellant will be called plaintiff and the appellee defendant.

The declaration consists of five counts charging the defendant with negligence resulting in injury and damage to the plaintiff, The first count charges that the defendant is a licensed chauffeur engaged in the taxi business; that he accepted passengers for hire and conveyed them from place to place by means of an automobile and to-wit, a Ford Sedan, which he owned, managed and controlled; that he conveyed plaintiff as a passenger for hire; that it was his duty to provide safe means for conveyance and make, or cause to be made, all reasonable inspection and investigation to discover defects in the wheels and other parts, which would make the car unsafe and to repair the same; that he failed in his duty to plaintiff; that he did not inspect, or cause to be inspected, the right front wheel of said car for defects and have same repaired, so as to make said car safe for the conveyance of passengers; that he thereby wrongfully and negligently permitted

1938

Appeal from the
Circuit Court of
Tropis County.

Appellant

vs

JOHN L. SMILEY,

Appellee

238 I.A. 648

1938

Rollin Wallingford, appellant, instituted this suit in the Circuit Court of Tropis County against John L. Smiley, appellee, to recover damages for an injury she claims to have received on August 19, 1933 when she was riding in an automobile owned and operated by appellee who was hired by appellant to take her from place to place in the discharge of her business as a saleslady.

A jury trial was had and a finding in favor of appellee; a motion for a new trial having been denied judgment was rendered on the verdict and appellant prosecutes this appeal.

For the purposes of this opinion the appellant will be called plaintiff and the appellee defendant.

The declaration consists of five counts charging the defendant with negligence resulting in injury and damage to the plaintiff. The first count charges that the defendant is a licensed chauffeur engaged in the taxi business; that he accepted passengers for hire and conveyed them from place to place by means of an automobile and vehicle; that he owned, managed and controlled; that he conveyed plaintiff as a passenger for hire; that it was his duty to provide safe means for conveyance and make, or cause to be made, all reasonable investigation and inspection to insure safety in the vehicle and driver, which would make the car unsafe and to render the same; that he failed in his duty to plaintiff; that he did not inspect, or cause to be inspected, the right front wheel of said car for defects and have same repaired, so as to make said car safe for conveyance.

a certain casting, which held said wheel in place, to become so badly worn that on, to-wit, the date aforesaid, while the plaintiff was being conveyed by defendant in said automobile for hire, and while plaintiff was in the exercise of due care for her own safety and without knowledge of any defects in said wheels, or any of them, and while defendant was a licensed chauffeur, owner of and in possession and control of said automobile by reason of said negligence of said defendant the right front wheel came off from said automobile causing same to skid, etc., and by means of which the plaintiff was injured.

The second count avers that it was the duty of said defendant to keep and maintain said automobile in a proper state of repair, so that the same would be a safe means of conveyance and free from dangers to life and limb of passengers for hire while being conveyed therein and that he wrongfully and negligently permitted a certain casting which held the right front wheel in place to become so badly worn that while plaintiff was being conveyed by him on the date aforesaid having no knowledge of the defect and in the exercise of due care for her own safety and while the defendant was a licensed chauffeur, owning, possessing, controlling and driving said automobile by reason of his negligence said right front wheel came off thereby causing the injury to plaintiff.

The third count charges that the defendant wrongfully and negligently drove said automobile at a speed greater than was reasonable and proper having regard for the traffic and use of the way, and so as to endanger the life and limb by means whereof it skidded and upset causing the injury.

In the fourth count it is stated that the defendant as a competent chauffeur knew, or by the exercise of due care should have known of said defect complained of.

The fifth count sets up that the defendant so carelessly, negligently and improperly managed said automobile, that by reason of said negligence and improper conduct the right front wheel came off causing the right front wheel to skid causing the injury.

... certain testing, which said wheel is shown to have been
... the date of the accident, while the defendant was being
... conveyed by defendant in said automobile for hire, and while defendant
... was in the exercise of the duty of driving and while defendant was
... of any defects in said wheels, or any of them, and while defendant was
... a licensed chauffeur, owner of and in possession and control of said
... automobile by reason of said negligence of said defendant the right
... front wheel, came off from said automobile causing injury to the
... and by reason of which the plaintiff was injured.

The second count asserts that it was the duty of said defendant
to keep and maintain said automobile in a proper state of repair so
that the same would be a safe means of transportation and that defendant
in life and limb of passengers for hire while being conveyed therein
and that he negligently and recklessly neglected a careful inspection
which said front wheel in place in which it became so badly worn
that said plaintiff was being conveyed by him on the date of the
having no knowledge of the defect and in the exercise of the duty of
driving and while the defendant was a licensed chauffeur, owner,
control, and driving said automobile by reason of his
negligence said front wheel came off from said automobile causing
injury to the plaintiff.

The third count alleges that the defendant negligently and
recklessly drove said automobile at a speed greater than was reason-
able and proper having regard to the traffic and use of the way, and
as a consequence the life and limb of means whereby it skidded and
caused the injury, and more or less.

In the fourth count it is stated that the defendant as a
licensed chauffeur knew, or by the exercise of due care should have
known of said defect and failed to repair it.

The fifth count sets out that the defendant was negligent
in driving and recklessly caused said automobile to be driven

All counts alleged that the plaintiff paid out divers sums of money endeavoring to be cured. To which declaration appellee pleaded the general issue and a special plea setting up that both parties were bound by the Workmen's Compensation Law. A demurrer was filed to the special plea which was sustained by the court and thereupon appellant filed a similiter to the general issue.

The evidence shows that the plaintiff during the summer of 1923 was engaged in selling standard reference books to school districts that she commenced her work in Iroquois County the latter part of May and worked until the time that she received the injury of which she complains which occurred on August 1st. She required the services of a chauffeur to drive her in his car from place to place. At first she was driven by a young man by the name of Kline and later by the defendant who according to the contention of plaintiff went to the place where she roomed and solicited the job and she employed him at \$7.00 per day.

It appears that the defendant owned and operated a two door Ford Sedan which he had driven for a period of over two years and with this car he entered upon his engagement with the plaintiff on the 31st day of May 1923. He drove her all told thirty-six days for which she payed him \$7.00 per day.

It further appears that the plaintiff was successful in her business and that she was employed because of her experience and was promoted soon after as sales manager in the field; that it was a part of her duties to train and start other sales people and that her company was willing to pay her a large commission in order to secure her experienced services in training others.

The evidence discloses that during the months of June and July, 1923, she was paid \$1852.50 which was the gross amount received by her and out of which she paid taxi bills and other expenses. At the time of her injury she was training Mrs. Rose Wiler. On the day of the accident the defendant left Watseka about seven-thirty in the morning with plaintiff and Mrs. Wiler in his car and drove toward the

All counts alleged that the plaintiff will not receive any money endeavoring to be cured. To which defendant appealed. The general issue and a special plea setting up that both parties were bound by the Workmen's Compensation Law. A summary was filed to the special plea which was sustained by the court and thereupon appellant filed a similar to the general issue.

The evidence shows that the plaintiff during the summer of 1932 was engaged in selling standard reference books to school districts. She commenced her work in Iroquois County the latter part of May and worked until the time that she received the injury of which she complains which occurred on August 1st. She required the services of a chauffeur to drive her in his car from place to place. At first she was driven by a younger man by the name of Kline and later by the defendant who according to the contention of plaintiff went to the place where she resided and solicited the job and she employed him at \$7.00 per day.

It appears that the defendant owned and operated a two door 1932 sedan which he had driven for a period of over two years and with this car he entered upon his engagement with the plaintiff on the first day of May 1933. He drove her all told thirty-six days for which he paid him \$7.00 per day.

It further appears that the plaintiff was successful in her business and that she was employed because of her experience and was promoted soon after as sales manager in the field; that it was a part of her duties to train and start other sales people and that her company was willing to pay her a large commission in order to secure her experienced services in training others.

The evidence discloses that during the months of June and July, 1933, she was paid \$1362.50 which was the gross amount received by her and out of which she paid taxi bills and other expenses. At the time of her injury she was training Mrs. Rose Wilcox. On the day of the accident the defendant left Waterloo about seven-thirty in the

southwest part of the country. They found that the farmers were busy threshing and it was suggested by the plaintiff that they drive to Piper City and after canvassing the village they would return to Watseka. They drove on an eastward road to a point two miles west of a place called Thawville when the defendant on his own motion turned north on a hard black dirt road fairly smooth, with no obstructions in sight, and while driving in a beaten track about six feet from the ditch on the east side of the road and when twenty or twenty-five rods north of a corner, defendant's car lurched quickly to the right. It is the contention of the plaintiff that the defendant made no attempt to put on the brakes or any effort to stop the car. At the time of and immediately prior to the accident the defendant was sitting in the drivers seat in front to the left; Mrs. Wiler in the rear seat immediately behind him and the plaintiff on the right hand side of the rear seat. The right front seat having been tipped forward, the space in front of the plaintiff was occupied by two small packages of books in straw board boxes.

It appears that the road was somewhat oval, having been graded not long before, sloping from the center to a ditch, which on the east side was two feet deep with an almost perpendicular bank. It further appears that after the lurch of the car it seemed to be going fast toward the ditch and plaintiff braced herself and at a point about twenty rods from the corner heretofore spoken of the right front wheel came off of the hub of defendant's car. The wheel ran ahead across the ditch and up against the hedge fence. When the wheel came off the right front axle dropped to the ground and the car skidded something like fifty feet or more running into the ditch with the front end of the car up against the embankment. The right side of the front end of the car dug a piece out of the bank. When the car hit the bank it stopped very suddenly. The wheel was found about opposite the car lying against the hedge on the east side of the road. When the axle dropped to the ground the plaintiff was thrown forward on the floor of the car and her head hit something in front of her. The impact of the car caused Mrs. Wiler to fall. The plaintiff's leg was broken. She

...part of the country. They found that the defendant was not
...by the plaintiff and that they were
...the village they would return to Waterville.
...on an eastward road to a point two miles west of a place
...the defendant on his way toward Waterville.
...road that road being a dirt road, with no shoulders or ditches,
...in a single track about six feet from the side of the
...side of the road and when twenty or twenty-five rods north of a
...corner, defendant's car turned quickly to the right. It is the con-
...tion of the plaintiff that the defendant made no attempt to put on
...brakes or any effort to stop the car. At the time of and immediately
...prior to the accident the defendant was sitting in the driver's seat in
...to the left. Mrs. Willet in the rear seat immediately behind him
...and the plaintiff on the right hand side of the rear seat. The right
...seat having been tipped forward, the space in front of the
...plaintiff was occupied by two small packages of books in straw bound
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...the ditch and plaintiff braked herself and at a point about
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...up against the hedge fence. When the wheel came off the
...the front axle dropped to the ground and the car skidded something
...the ditch or more turning into the ditch with the front end of
...the car against the embankment. The right side of the front end
...the car ran a piece out of the bank. When the car hit the bank it
...very suddenly. The wheel was found about twenty rods from the
...the ditch on the east side of the road. When the car stopped
...the ground the plaintiff was thrown forward on the floor of the car

suffered a multiple fracture of the left tibia commonly known as the shin bone. The plaintiff was, after having received the injury, taken to Watseka and to the office of Dr. Buckner where her limb was X-rayed and put in a cast and she was then taken by the doctor to the Iroquois Hospital in Watseka, where she remained for two months. On October 1st the plaintiff, then being able to walk with the aid of crutches was taken from the hospital to the Gilbraeth home in Watseka where she remained over a month and until able to walk with a cane. She left the Gilbraeth home early in November 1923. Plaintiff contends that her limb still pains her and that she has never been able to work as formerly and as a result of her injury her left limb up to the hip joint has become swollen and enlarged. The testimony tends to show that this condition may last for several years and may be permanent.

It is in fact conceded in the evidence that the defendant drove the car with a defective hub on his right front wheel and that this defect permitted the wheel to come off.

The only issue in the case is, was appellee negligent? Did he know or should he, in the exercise of due care, have known, that the hub was defective? Did he manage his car at and immediately prior to the time of the injury in a reasonable careful manner?

It appears that the defendant used what is known as a Stewart wire wheel; that in putting this style of wheel on the spindle the hub is first installed on the spindle and held in place by a nut on the end of the spindle. Each side of the hub is in the form of a quadrangle and gets a little smaller back toward the flange with a ridge or shoulder at each corner. The hub was introduced in evidence and certified to this court with other exhibits in the case for the inspection of the court. ~~It~~

The testimony discloses that in cars of the character used by the defendant that after the hub is installed on the spindle the wheel is slipped on over the hub and given about an 1/8 of a turn and locks behind the shoulder. When these shoulders wear down there is nothing to prevent the wheel slipping off at the hub and when the shoulders of the hub are sufficiently worn to permit the wheel

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...the plaintiff, then being able to walk with the aid of crutches was

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...that after the hub is installed on the spindle the
...and given about an 1/8 of a turn and
...When these shoulders wear down there is

6.

to come off then the wheel in driving will wobble and the wobble will be reflected in the steering wheel of a ford car and the driver would know something was wrong. The testimony is also to the effect that the worn condition of the wheel can also be discovered by reasonable inspection, taking the wheel off, shaking it or standing in front of the car and looking at it. The evidence shows that the shoulders on the hub in question were badly worn and had been in that condition a long time.

Various reasons are urged by the plaintiff why the judgment should be reversed and we are of the opinion that some of the errors alleged are such as will justify a reversal of the judgment. It is apparent that improper evidence was offered, improper remarks and insinuations were made and improper instructions were given which seriously prejudiced the case. It is contended by the defendant that there is no cause of action and for that reason the judgment should be affirmed. The plaintiff had the right to have her case submitted to a jury unbiased and unprejudiced by many of the facts appearing in the record. The record discloses that during the trial Dr. Buckner, a witness for the plaintiff, and Dr. Herdien, a witness on the part of the defendant, having given it as their opinion that the swollen and enlarged limb was due to a fracture, they were each asked by counsel for the defendant if it might not be due to siphilis. Dr. Herdien testified that he had examined plaintiff's limb shortly prior to the trial and was then asked by counsel for defendant whether he had ever seen this lady's leg prior to the accident. While the plaintiff was on the stand she was asked by counsel for the defendant whether she wore high heeled shoes; whether or not she had been an actress or a singer or a phrenologist and whether or not on her travels she traveled alone.

On the trial counsel for the defendant brought out the fact that the plaintiff had insurance which covered her injuries. This has been held to constitute reversible error. With reference to this feature of the case plaintiff's counsel, after the court had excluded

...the wheel in driving will wobble and the wobble will be reflected in the steering wheel of a Ford car and the driver would know something was wrong. The testimony is also to the effect that the worn condition of the wheel can also be discovered by reasonable observation, taking the wheel off, shaking it or standing in front of the car and looking at it. The evidence shows that the shoulder on the hub in question were badly worn and had been in that condition some time.

Various reasons are urged by the plaintiff why the judgment should be reversed and we are of the opinion that some of the errors alleged are such as will justify a reversal of the judgment. It is apparent that improper evidence was offered, improper remarks and instructions were made and improper instructions were given which seriously prejudiced the case. It is contended by the defendant that there is no cause of action and for that reason the judgment should be affirmed. The plaintiff had the right to have her case submitted to a jury unbiased and unprejudiced by many of the facts appearing in the record. The record discloses that during the trial Dr. Hardien, a witness for the plaintiff, and Dr. Herdier, a witness on the part of the defendant, having given it as their opinion that the swollen and enlarged limb was due to a fracture, they were each asked questions for the defendant if it might not be due to syphilis. Dr. Hardien testified that he had examined plaintiff's limb shortly prior to the trial and was then asked by counsel for defendant whether he had ever seen this lady's leg prior to the accident. While the plaintiff was on the stand she was asked by counsel for the defendant whether she wore high heeled shoes; whether or not she had been an actress or a singer or a gymnast and whether or not on her travels she traveled.

On the trial counsel for the defendant brought out the fact that the plaintiff had been seen with a fracture of the limb.

the evidence, called attention to it of their own motion and if it were the only error we might be willing to overlook it notwithstanding the fact that counsel for the defendant improperly referred to it in the argument to the jury.

During the trial it appears that the plaintiff fainted in the court room and counsel for the defendant in the argument made improper remarks with reference to the incident. The wife of the defendant was called as a witness by the defendant. Counsel surely were aware of the fact that she was an incompetent witness and should not have called her. As she left the witness stand she remarked, "I am awful sorry about it. I would have made a better witness than he would", evidently meaning her husband. There are other incidents including remarks of counsel with reference to the condition of the plaintiff having been caused by syphilis instead of being the result of the accident. There was no evidence upon which to base any such insinuation and was highly improper.

The evidence also contains comments by counsel for the defendant with reference to the price which the plaintiff was receiving for certain sets of books which it is claimed she was selling to school directors and that she was making off of the school directors exorbitant profits. This evidence had no place in the record and should not have been admitted.

Complaint is made of the fifth, seventh, eighth and ninth instructions given on behalf of the defendant. The eighth instruction was with reference to latent defects in the automobile which caused the accident. There was no evidence of latent defects, and the instruction did not cover the entire declaration and should not have been given. The evidence shows that the accident was caused by a patent defect and not a latent defect. The ninth instruction is defective for the reason that it is misleading and there is no evidence that the proximate cause of the injury was the fact that the plaintiff's leg was broken because the woman who was riding with her fell upon her. It is true that this instruction tells the jury that if they believe that the proximate cause of the injury was not the

the evidence, called attention to it by their own motion and it is the only error we might be willing to overlook it not withstanding the fact that counsel for the defendant improperly referred to it in argument to the jury.

During the trial it appears that the plaintiff testified in the court room and counsel for the defendant in the argument made improper remarks with reference to the accident. The wife of the defendant was called as a witness by the defendant. Counsel surely were aware of

the fact that she was an incompetent witness and should not have called her. As she left the witness stand she remarked, "I am awfully sorry about it. I would have made a better witness than he would", evidently meaning her husband. There are other incidents including remarks of counsel with reference to the condition of the plaintiff having been caused by syphilis instead of being the result of the accident. There was no evidence upon which to base any such insinuation and was highly

The evidence also contains comments by counsel for the defendant with reference to the price which the plaintiff was receiving for certain sets of books which it is claimed she was selling to school directors and that she was making off of the school directors' private property. This evidence had no place in the record and should not have been admitted.

Complaint is made of the fifth, seventh, eighth and ninth instructions given on behalf of the defendant. The eighth instruction with reference to latent defects in the automobile which caused the accident. There was no evidence of latent defects, and the instruction did not cover the entire declaration and should not have been given. The evidence shows that the accident was caused by a latent defect and not a latent defect. The ninth instruction is

objection for the reason that it is misleading and there is no evidence that the proximate cause of the injury was the fact that the automobile was broken because the woman who was riding with her

was riding with her

negligence of the defendant then they should find the defendant not guilty, but that part of the instruction does not overcome the misleading character of the first part of the instruction.

We are of the opinion that there is not sufficient error in the fifth and seventh instructions to work a reversal.

It is insisted by the defendant that no exceptions were taken to the rulings of the court and that some of the evidence was admitted without objection. It is true that in some of the instances the abstract does not show that exceptions were preserved and to some of the errors assigned it is true the abstract does not show that objection was made. Of course no error can be assigned upon erroneous rulings to which objection has not been made or to which exception is not preserved. It is very apparent to our minds after an examination of the entire record in this proceeding, that this case was improperly tried and that many things were said and done which were calculated to greatly prejudice the case of the plaintiff and which are sufficient to work a reversal and to which objections were made and exceptions preserved.

We repeat that the plaintiff had the right to have her case submitted to a jury unbiased and unprejudiced by many of the facts appearing in the record. Her case was not so presented.

We are of the opinion, therefore, that the judgment should be reversed and the cause remanded for another trial which is accordingly done.

Reversed and remanded.

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...but that part of the instruction does not overcome the mis-
...of the first part of the instruction.

We are of the opinion that there is not sufficient error in
...the fifth and seventh instructions to work a reversal.

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...in this proceeding, that this case was improperly tried and that many
...things were said and done which were calculated to greatly prejudice
...the case of the plaintiff and which are sufficient to work a reversal
...and to which objections were made and exceptions preserved.

We further find that the plaintiff has the right to have the case
...submitted to a jury and that the facts were not properly presented
...in the record. The case was not so presented.

We are of the opinion, therefore, that the judgment should
...be reversed and the cause remanded for another trial which is accord-

Reversed and remanded.

Not to be used for any other purpose.

The evidence is as follows:

and not a factual defect.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
Mar, in the year of our Lord one thousand
nine hundred and twenty-04.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk of the
Court of Illinois, and Keeper of the
true copy of the opinion of the said App.

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Repearing Darned
Jun. 12 1976

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

238 I.A. 648

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 10 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

FORM OF THE APPENDIX

MARGARET JORDAN MULVILHILL

vs

MALACHI TOWNER, et al,

MARGARET ORGAN, et al

Appellees

vs

MALACHI JORDAN

Appellant.

Appeal from the
Circuit Court of
DeKalb County.

238 I.A. 648

J.

On June 27th, 1895 John Jordan sold and conveyed to his son Joseph, a real estate in DeKalb County and in order to secure a portion of the purchase price, Joseph executed and delivered to his father six notes aggregating \$6000.00, the payment thereof being secured by a mortgage upon the real estate. The father also sold his son some personal property and the son, in consideration thereof, executed and delivered to his father two notes of \$600.00 and one note for \$700.00.

Joseph Jordan died testate on March 3rd, 1899. The appellant, Malachi Jordan, his brother, was appointed executor of his will and according to the terms he and Thomas Horan were appointed trustees and directed to hold the assets of the estate until the children of the testator, Margaret Jordan Mulvihill and Francis Lester Jordan, should each become twenty-one years of age. The estate was duly settled and under the direction of the Circuit Court the same was administered and in their final report the trustees credited themselves with \$1900.00, being the aggregate of the principal of the said three notes paid and delivered by Joseph Jordan to his father, John Jordan, in payment for the personal property, their report showing that said sum was by the trustees paid to Malachi Jordan. This report was approved, the beneficiaries receipted for the amount which the report showed they were each entitled to and the trustees were discharged.

The notes aggregating \$6000.00 having been paid but the mortgage which was executed by Joseph Jordan to his father to secure the same not having been recorded of record, Margaret Jordan Mulvihill and Francis Lester Jordan,

THE STATE OF MISSISSIPPI

Appeal from the
Circuit Court of
DeKalb County.

vs
TOWNE, et al,
vs
OWEN, et al

Appellants

vs

JORDAN

Appellee.

238 I.A. 648

On June 27th, 1885 John Jordan sold and conveyed to his son Joseph, real estate in DeKalb County and in order to secure a portion of the price, Joseph executed and delivered to his father six notes aggregating \$6000.00, the payment thereof being secured by a mortgage upon the property also sold his son some personal property and the sum, in the year 1885, executed and delivered to his father two notes of \$600.00 each for \$1200.00.

Joseph Jordan died testate on March 2nd, 1897. The will named his brother, as appointed executor of his will and administrator of his estate until the children of the testator, Joseph Jordan and Francis Lester Jordan, should each become twenty-two years of age. He and Thomas Horn were appointed trustees and directed to hold the assets of the estate until the children of the testator, Joseph Jordan and Francis Lester Jordan, should each become twenty-two years of age. He was duly settled and under the direction of the Circuit Court the administrator and in their final report the trustees detailed the assets of the estate, being the aggregate of the principal of the said three notes and delivered by Joseph Jordan to his father, John Jordan, in payment of personal property, their report showing that said sum was by the trustees of the estate. This report was approved, the trustees detailed the amount which the report showed they were each entitled to and the same was disbursed.

The notes aggregating \$6000.00 having been paid for the mortgage and executed by Joseph Jordan to his father to secure the same had become

heirs, devisees and beneficiaries under the will of their father, Joseph Jordan, filed on May 8th, 1920, their original bill herein alleging that the existence of this mortgage constituted a cloud upon their title and sought to remove it from the record and also to correct certain other defects in the title which were alleged in the bill. John Jordan having died on May 14th, 1904, his heirs being his children, Micheal, Malachi, Edward, Margaret Organ, Nora Lynn and Mary Keenan and his grandchildren, Frank Jordan and Etta Jordan (children of a deceased son, Thomas Jordan), and Colas Jordan and Catherine Jordan (children of a deceased son, John Jordan) together with trustees under the will of Joseph Jordan and others were made parties defendant to this original bill.

On June 14th, 1920, Margaret Organ, Nora Lynn, Mary Keenan, Micheal Jordan, Colas Jordan and Catherine Jordan filed their crossbill, which represented, among other things, that no administration was ever had upon John Jordan's estate but that all the debts and claims against his estate had long been satisfied; that at the time of his death a large sum, the amount of which was unknown, was due John Jordan from the estate of Joseph Jordan; that Malachi Jordan had received from the estate of Joseph Jordan, such sum, and that Malachi Jordan had no authority from the heirs of John Jordan to dispose of any of the assets of the estate of John Jordan and that he had appropriated such sum so received by him to his own use; that Malachi Jordan, claiming to act for and on behalf of the estate of John Jordan, and while acting as trustee of the estate of Joseph Jordan, received from himself as a part of said indebtedness and appropriated the same to his own use. The cross-bill prayed that an account should be taken of the amounts received by Malachi of the funds of the estate of John Jordan; that this court administer and settle the estate of John Jordan, deceased, and that a judgment be entered against Malachi for the amount of the assets of the estate of John Jordan, deceased, converted by him to his own use and that such amount be distributed to the heirs of John Jordan under the direction of the court.

Appellant, Malachi Jordan and some of the other defendants, to both the original and the cross-bill defaulted, others answered, a hearing was had and a decree rendered in accordance with the prayers of both the original bill and the cross-bill. Subsequently on motion of appellant, the default as to

...lawson and beneficiaries under the will of their father, Joseph
...on May 8th, 1930, their original bill herein alleging that the
...this mortgage constituted a cloud upon their title and sought to
...it from the record and also to correct certain other defects
...which were alleged in the bill. John Jordan having died on May
...his heirs being his children, Michael, Michael, Edward, Mar-
...John Jordan and Mary Keenan and his grandchildren, Frank Jordan
...Jordan (children of a deceased son, Thomas Jordan), and John Jordan
...Jordan (children of a deceased son, John Jordan) together with
...of Joseph Jordan and others were made parties de-
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...to receive of him the said sum, that Michael Jordan,
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...of the estate of Joseph Jordan, received from Michael Jor-
...of said Michael Jordan and that the sum of \$10,000
...that an account should be taken of the amounts received
...of the estate of John Jordan; that this court administer
...of John Jordan, deceased, and that a judgment be entered
...for the amount of the assets of the estate of John Jordan, de-
...by him to his own use and that such amount be distributed
...under the direction of the court.
...Jordan and some of the other defendants, to both
...defendants, certain answers, a motion was
...in accordance with the provisions of said original bill

was set aside, the decree was opened up and he filed an answer to the original bill in which he admitted that the original complainants were entitled to the relief prayed for. In his answer to the cross-bill he admitted that at the time of the death of Joseph Jordan, he, Joseph was indebted to John Jordan on three promissory notes, two for \$600.00 each and one for \$700.00; John Jordan held these notes at the time of the death of Joseph Jordan and they were unpaid and that he failed to file said notes as a claim against the estate of Joseph Jordan. He denies that John Jordan at the time of his death was the owner of these three notes but avers that John Jordan in his lifetime gave the notes to him and in the distribution of his estate among his children delivered the possession of them. He avers that he was acting for himself in the collection of any money from the estate of Joseph Jordan and that he pretended to act for the estate of John Jordan or that he had appropriated to his own use any funds from the estate of Joseph Jordan due or owing to the estate of John Jordan.

The answer of the complainants in the original bill to the cross-bill admitted that their father at the time of his death was indebted to John Jordan for personal property purchased by him and that the three notes aggregating \$1,900.00 were given therefor and were unpaid at the time of the death of Joseph Jordan; that they were not filed as a claim by John Jordan against the estate of Joseph Jordan and that after the death of John Jordan these notes were in the possession of Malachi Jordan and were paid by the trustees of their father's estate on June 16th, 1916, at which time the trustees turned over to them the proceeds of the estate of their father to which they were entitled under his will.

All of the other defendants in the cross-bill, including Edward Jordan, John Jordan and De Etta Jordan defaulted. Replications were filed to the original answers and the cause was referred to a special master to take the depositions and report his conclusions of law and fact. The special master took the evidence and made his report in which he recommended that the cross-bill be dismissed for want of equity, subsequently, however, an additional or amended report was filed by him in which he states that he was of the opinion that he had not correctly applied the law to the facts as he found them and that he was in accordance with the law as stated in *Rothwell v Taylor*, 303 Ill. 226,

[illegible]

und that appellant had not received these notes as a gift from his
r and further that appellant had collected on June 16th, 1916, the prin-
l of said notes, \$1900.00 and had retained the same although said sum
ged to the estate of John Jordan. He recommended that the Circuit Court
d take upon itself the administration of the estate of John Jordan and
appellant should be ordered to pay said sum of \$1900.00 with 5% interest
on from June 16th, 1916. A decree was thereupon rendered which found
John Jordan died seized and possessed of these three notes and that no
of said notes had ever been made by John Jordan to appellant; that on
1st, 1916, the trustees of the estate of Joseph Jordan paid appellant
0.27 in full payment of said notes which amount appellant has converted
his own use. The decree then refers the cause to the Master with direc-
s that he compute the amount of interest on said sum of \$1140.27 from
1st, 1916, at 5% and that he make distribution of that amount to the
s at law of John Jordan. From this decree appellant has brought the
rd to this court for review.

On March 29th, 1924 long after the evidence had been taken and the
ial master had made his report, appellant asked leave to amend his answer
etting up the five year statute of limitations also the provision that
claims and demands against an estate should be exhibited within the
utory period, that cross-complainants were guilty of laches, that their
ly was at law and not in equity; that the cross-bill was not germane to
original bill and that there was no equity in it. The court refused to
it this amendment and appellant insists that this was error. The statute
iring claims to be exhibited within a limited time from the granting of
ers of administration has no application to the facts in this case and
much as appellant received the money on these notes in 1916 and the cross-
herein was filed in 1920, whatever claim cross-complainants had against
was not barred by the five year statute of limitations or by the laches
ross-complainants. Had a demurrer been interposed to that portion of the
s-bill which was sustained by the proof on the ground that such allegations
not germane to the original bill, we are of the opinion it should have
sustained by the chancellor, but whether the cross-bill was germane to

[illegible]

law are not preserved in this record for our review. Appellant saw fit to answer this cross-bill. He put in issue its material allegations and permitted the case to go to a hearing upon ~~the~~ the merits and thereby submitted himself to the jurisdiction of the court in the case made by the pleadings and so waived these questions. *Campbell v Potter*, 147 Ill. 576; *McIntyre v McIntyre*, 287 Ill. 544; *Foran v Shank*, 217 Ill. App. 203; *Ackley v. Croucher*, 203 Ill. 530. It is conceded that John Jordan died intestate; that he left no debts and that his funeral expenses have long since been paid. There are no creditors and there is no dispute as to who are his heirs and entitled to a distributive share of his estate if he left any estate. No question is raised upon this appeal so far as the original bill and the decree thereon is concerned and the only question so far as the merits of the case presented by the cross-bill and the answer of appellant thereto, is whether John Jordan had title to these notes at the time of his death or had they been delivered by him to appellant as a gift. Under the authority of *Moore v Brandenburg*, 248 Ill. 232, cross-complainants may maintain this cross-bill for the relief sought and in refusing permission to appellant to amend his answer the chancellor did not abuse his discretion.

Thomas Horan, a witness called by cross-complainants related a conversation with appellant in which appellant insisted that his father had given him these notes and that he was going to collect them from the children of Joseph when they would be entitled to their property, and Horan thereupon told appellant that if his brothers and sisters heard of it they would make trouble, to which appellant replied that they (the brothers and sisters) would never know about it unless Horan told them. Edward Jordan, a brother of appellant testified that his father had made a division of his estate before his death and related a conversation with appellant in which he claims appellant told him that the children of Joseph would probably pay these notes sometime and if they did there would be a division of the proceeds among the heirs of John Jordan. Appellant denied having had this conversation with Edward. Cross-complainants offered in evidence a letter dated

law are not preserved in this record for our review. Appellant saw this to answer this cross-bill. He put in issue its material allegations and permitted the case to go to a hearing upon the merits and thereby submitted himself to the jurisdiction of the court in the case made by the pleadings and he waived these questions. Campbell v Potter, 147 Ill. 578; McIntyre v McIntyre, 287 Ill. 544; Foxen v Shank, 217 Ill. App. 303; Adley v. Crowther, 303 Ill. 530. It is conceded that John Jordan died intestate; that he left no debts and that his funeral expenses have long since been paid. There are no creditors and there is no dispute as to who are his heirs and entitled to a distributive share of his estate if he left any estate. He was not a resident when this appeal is set as the original bill and the decree therein is concerned and the only question so far as the merits of the case are concerned by the cross-bill and the answer is appellant's claim that John Jordan had title to these notes at the time of his death or had they been delivered by him to appellant as a gift. Under the authority of Moore v Brandenburg, 248 Ill. 232, cross-complaints may contain a cross-bill for the relief sought and in retaining jurisdiction is appellant to amend his answer the chancellor did not abuse his discretion.

Thomas Horn, a witness called by cross-complaintants related a conversation with appellant in which appellant stated that his father had given him these notes and that he was going to collect them from the children of Joseph when they would be entitled to their property, and when thereupon told appellant that if his brothers and sisters heard of it they would make trouble, to which appellant replied that they (the brothers and sisters) would never know about it unless Horn told them. Edward Jordan, a brother of appellant testified that his father had made a division of his estate before his death and related a conversation with appellant in which he claims appellant told him that the children of Joseph would probably pay these notes sometime and if they did there would be a division of the proceeds among the

April 17th, 1916 written by appellant to his nephew and niece, Lester and Margaret, (the original complainants) who were then living at Redlands, California. With this letter appellant sent them the final report of himself and his co-trustee. He explains various items and in referring to the notes involved in this litigation said, "There is the item of bills payable for the F. R. Jordan notes, numbers 1,2 and 3 against the estate for \$1900.00 which represents three notes that your grandfather had against the estate; two for \$600.00 each and one for \$700.00, these being for the amount that was owed on the farm by your father, and which were left to me by your grandfather. All of these notes bear interest but I do not want any interest on them from you and Margaret, all that I ask for is the principal. These notes are offset by the item of bills receivable on page two which represents the notes which the estate held against me. These two items are of a like amount and offset each other." The items referred to in this letter appear in the final report of the trustees as follows, viz: "March 1st, 1916, bills receivable (notes of M. L. Jordan to estate with interest(\$1900.00 and "March 31st, 1916 bills payable to M. L. Jordan for J. R. Jordan notes, 1,2,3 against estate \$1900.00". The reports of appellant as executor of the will of Joseph Jordan shows that on July 26th, 1899 and again on August 14th, 1900, interest was paid by him on these notes of John Jordan. John Faissler, a witness called by cross-complainants testified to a conversation with appellant in which appellant told him that he was the owner of these three notes.

The foregoing is substantially all the competent evidence found in this record. Appellant was an incompetent witness to testify to the circumstances of the alleged gift or what his deceased father said or did. *Rothwell v Taylor*, supra. The fact that appellant could not testify to facts surrounding the transaction because of his incompetency did not relieve him of the burden of establishing his defense with such competent evidence as was available to him. *Niland v Kennedy*, 316 Ill. 253. The witnesses, Moran and Faissler were called by cross-complainants and their evidence was competent. The cross-complainants also offered in evidence the letter written by appellant to Margaret

April 1933, this will be written by appellant to his mother and sister, and
 and mother, (the witness) who was then living at 1111
 Santa, California. With this letter appellant sent them the final
 report of himself and his co-trustees. He explained various items and
 in referring to the notes involved in this litigation said, "There is
 the item of bills payable for the W. L. Jordan notes, numbers 1, 2 and
 3 against the estate for \$100.00 each representing three notes and
 your grandfather had against the estate; two for \$500.00 each and one
 for \$100.00, these being for the amount that was owed on the term by
 your father, and which were left to me by your grandfather. All of these
 notes bear interest but I do not want any interest on them from you and
 therefore, all that I ask for is the principal. These notes are offset
 by the item of bills receivable on page two which represents the notes
 which the estate held against me. These two items are of a like amount
 and offset each other." The items referred to in this letter appear
 in the final report of the trustees as follows, viz: "March 1st, 1933,
 bills receivable (notes of W. L. Jordan to estate with interest) \$100.00
 and "March 1st, 1933 bills payable to W. L. Jordan for W. L. Jordan
 notes, 1, 2, 3 against estate \$100.00". The reports of appellant as
 executor of the will of Joseph Jordan shows that on July 28th, 1933
 and again on August 14th, 1933, interest was paid by him on these notes
 of John Jordan, John Taylor, a witness called by cross-examination
 testified to a conversation with appellant in which appellant told him
 that he was the owner of these three notes.
 The foregoing is substantially all the competent evidence
 found in this record. Appellant was an incompetent witness inasmuch
 to the circumstances of the alleged gift or what was reported to
 said v. said. Estelle v. Taylor, supra. The fact that appellant could
 not testify to facts surrounding the transaction because of his in-
 competency did not relieve him of the burden of establishing his claim
 with competent evidence as was available to him. Estelle v. Taylor,
 233 Ill. 432. The witness, John and Taylor were called by appellant

and Lester Jordan and it is insisted by counsel for appellant that the contents of this letter together with the evidence of Horan and Faissler clearly established the ownership of these notes by appellant. All that this evidence proves, however, is that appellant was in possession of these notes under claim of ownership by gift. His claim that his father gave them to him does not, as was said in *Rengel v. Schoden* 178 Ill. App. 151, amount to proof that his father did give them to him. Appellant having insisted in his answer that these notes were his property by gift from his deceased father he thereby assumed the burden of proving by evidence which was clear and not equivocal or uncertain that there was such a gift. *Millard v. Millard*, 221 Ill. 86 (93). This he failed to do. There is no competent proof that appellant had possession of these notes prior to his father's death and his proof of a gift is simply his possession of these unendorsed notes together with his claim of ownership. This was not sufficient. *Rothwell v. Taylor*, supra.

Appellees have assigned cross errors to that portion of the decree requiring appellant to pay \$1140.27 with interest from March 1st, 1916 and they insist that the decree should have followed the Master's report which recommended that appellant should be ordered to pay \$1900.00 with 5% interest thereon from June 16th, 1916, the date of the filing of the final report. We are at a loss to understand how the court arrived at the amount of \$1140.27. The only reference we find in the record to that amount is an item in the trustees report which was filed on March 4th, 1912 which shows that the amount then due and owing the trustees upon a note secured by a trust deed of appellant and his wife was \$1140.27. The finding of the Master was in accordance with the evidence which discloses that Malachi actually received \$1900.00 and that is the amount together with interest at 5% thereon from June 16th, 1916, he should be charged with, and the cross errors will be sustained.

For the reasons stated the cause is reversed and remanded with directions to modify the decree and to charge appellant with \$1900 and with interest thereon as herein indicated and to ascertain who

and Lester Jordan and it is insisted by counsel for appellant that the contents of this letter together with the evidence of Horn and witness clearly established the ownership of these notes by appellant. It is that this evidence proves, however, that appellant was in possession of these notes under claim of ownership by gift. His claim that his father gave them to him does not, as was said in *Hengel v. Schoben*, 178 Ill. App. 151, amount to proof that his father did give them to him. Appellant having insisted in his answer that these notes were his property by gift from his deceased father he thereby assumed the burden of proving by evidence which was clear and not equivocal or uncertain that there was such a gift. *Miller v. Miller*, 221 Ill. 52 (1912). This he failed to do. There is no competent proof that appellant had possession of these notes prior to his father's death and his proof of a gift is simply his possession of these unnumbered notes together with his claim of ownership. This was not sufficient. *Reiff v. Taylor*, supra.

Appellees have assigned cross errors to that portion of the decree requiring appellant to pay \$1140.27 with interest from March 1st, 1912 and they insist that the decree should have followed the Master's report which recommended that appellant should be ordered to pay \$1200.00 with 6% interest thereon from June 15th, 1912, the date of the filing of the final report. We are at a loss to understand how the court arrived at the amount of \$1140.27. The only reference we find in the record to that amount is an item in the trustee's report which was filed on March 4th, 1912 which shows that the amount then due and owing the trustee upon a note secured by a first lien of real estate was \$1140.27. The finding of the master was in accordance with the evidence which showed that the amount then due was \$1200.00 and that in the amount together with interest at 6% from June 15th, 1912, he should be charged with, and the same should be established.

For the reasons stated the decree is reversed and remanded with directions to modify the decree and to charge appellant with \$1200.00

the heirs of John Jordan are, and to make computation and to order distribution of the fund to the heirs of said John Jordan deceased. It is our conclusion that appellant shall pay the costs.

Reversed and remanded with directions.

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 7th day of
Mar, in the year of our Lord one thousand
nine hundred and twenty- six.

Justus L. Johnson
Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk

State of Ohio, and keeper of the Records and Seal

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STATE OF ILLINOIS
APPELLATE COURT

238 I.A. 648⁵

FOURTH DISTRICT

OCTOBER TERM, A. D. 1924.

Term No. 47.

Ag. No. 4.

THOMAS GROVES, Admr. &c.,
Appellee,
vs.
AMERICAN GLYCERIN Co.,
Appellant.

Appeal from Lawrence
Circuit Court.

OPINION BY BARRY, J.

Appellee charged, in his declaration, that on Feb. 7, 1921 and for a long time prior thereto, appellant was possessed of and was using and operating a nitro-glycerin business and was engaged in the manufacture, storage, transportation and use of nitro-glycerin for the shooting of wells in Lawrence County; that the same is a high explosive of the most dangerous and deadly kind; that it is a heavy, sticky liquid and when poured from the cans some of it remains therein; that appellant carelessly and negligently scattered and left the so-called empty cans in divers places of easy access and exposed to view in utter disregard of the safety of the public; that it stored and kept large quantities of such cans and glycerin in places that were not locked and that they were unguarded and unsafe; that it stored, handled, transported and used the same and scattered used cans in the vicinity of the Cross Roads School House where appellee's intestate was attending school; that by reason of appellant's negligence in the regards aforesaid one of

*Opinion filed
Dec. 2nd, 1924.
No. 238 I.A. 648⁵
Relating to the
McLaughlin, et al. vs. McLaughlin
for appellants*

*McLaughlin, et al. vs. McLaughlin
for appellants*

*Hon. J. C. Barry
Trial Judge*

its cans was found near the school house aforesaid by some of the school children and while it was in their possession it exploded and killed his intestate who was then and there about eleven years of age.

Appellant pleaded the general issue and special pleas by which it denied that the can referred to was its property, or in its possession or that it was left by any of its servants near the school house. The trial resulted in a verdict and judgment for \$3,000.00.

The undisputed evidence is that one of these so-called empty cans is as dangerous as one that is full. While at play some of the children found the can in question near the Cross Roads School House and curiosity led them to investigate. There was no mark upon the can to indicate what it had contained or to whom it belonged. One of the boys procured a portion of the contents and showed it to the teacher who expressed the opinion that it was some kind of paint. A boy then struck the can with a wrench and a terrific explosion followed resulting in the death of the teacher and seven of the children and the wreckage of the school house.

In *Bunyan vs. American Glycerin Co.*, 230 Ill. App. 351, we affirmed a judgment that was recovered for the death of the teacher and the Supreme Court denied a writ of certiorari. That was an approval of our conclusions, and, in effect, an affirmance of the judgment, but not necessarily an approval of the reasons given in our opinion, *Soden vs. Clancy*, 269 Ill. 98. In that case we said that the owners of a commodity so inherently dangerous as nitro-glycerin is required to exert the highest degree of care to keep it in close custody to prevent its doing mischief, and that duty never ceases; and such owner is liable for all the natural and probable consequences, which flow from any breach of that duty; that the utmost

caution and the highest degree of care must be used in the care and custody of such dangerous explosives.

We also said that a person is generally held liable for any injury resulting from leaving such explosives in a place accessible to children or where they are wont to congregate under circumstances which do not make them wilful trespassers and that the act of a child in causing the explosion is not such an intervening cause as will relieve a defendant from liability for a breach of his duty; that since disastrous results from negligence in the care of high explosives may reasonably be anticipated, courts will not look too narrowly for independent causes intervening between the injury and the original negligence. Those rules of law must have met the approval of the Supreme Court otherwise it would not have permitted the judgment to stand.

A motion for a bill of particulars and the court's ruling thereon are not a part of the common law record. They were not preserved by a bill of exceptions and cannot be considered by this court although the clerk has copied them into the transcript. *Bedee vs. People*, 73 Ill. 320; *People vs. Ellsworth*, 261 Ill. 275-277. Appellant pleaded to the declaration after its demurrer thereto had been overruled and thereby waived its right to assign error on the court's ruling in that regard, *Nordhaus vs. Vandalia R. R. Co.*, 242 Ill. 166. Some complaint is made because the court questioned a witness as to certain matters and because of remarks made by the court. No objections were made at the time and no ruling was requested. However, there was no improper conduct on the part of the court.

Appellant insists that there is no evidence that the can in question was its property, or that it had ever been in the possession of any of its servants, or that any servant left it in the vicinity of the school house. It says

that other companies were engaged in the handling and use of nitro-glycerin in the same locality at the time of and before the accident and that those companies used similar cans. It says that at times it exchanged cans with said companies. It argues that it proved that its men had large experience in handling the explosive and were capable and careful. It contends that the verdict is based solely on circumstantial evidence from which it may be inferred with equal certainty that the can found by the children was the property of one of those other companies and had been left near the school house by some servant thereof. That such being the state of the proof the court erred in refusing to direct a verdict in its favor.

It seems that the Independent Torpedo Co., was the first concern to engage in the nitro-glycerin business in Lawrence County. It left the field about 20 years ago and was followed by the Central Torpedo Co., which has not done business there for several years. Then came the Dupont Powder Co. in 1906 and the Illinois Torpedo Co., an Illinois corporation, in 1909. The Dupont Powder Co. was succeeded by appellant in 1912. The Illinois Torpedo Co. sold out to a Delaware Corporation of the same name in the summer of 1919 and the latter company sold to appellant in the fall or early winter of that year. Since that time until the date of the accident, February 7, 1921, appellant was the only concern engaged in that kind of business in said county. Appellant did not sell its glycerin. It was used only by employees in shooting wells.

The undisputed evidence is that the cans used and owned by appellant had flat handles, while those of the other companies had round handles. It is undisputed that the can which exploded and caused the death of appellee's intestate had a flat handle. There is evidence

that appellant had not exchanged cans with other companies for other years, and that the life of a can when exposed to the weather is about one year, and that the can in question was in a good state of preservation when found by the children. Appellant was the only concern engaged in the glycerin business in Lawrence County for more than a year prior to the accident. There is evidence that, in the summer and early fall of 1920, several men worked at the place where the children found the can in question and where another can was seen on the day of the accident and that no can was there during the time they worked there.

Appellant had a magazine and can shed and also a factory and can shed. The former was located about half a mile and the latter about four miles from the school house. There is evidence to the effect that some of appellant's employees were experienced and careful in taking glycerin to the wells to be shot and in placing the used cans in the truck, but that is as far as it goes. Mr. Grimes was employed as a hauler in the fall of 1920 and had no previous experience in the handling of glycerin. Appellant stored its used cans in sheds that were in a bad state of repair with openings for windows, but no windows, and the doors were sometimes left unlocked. On at least one occasion the agent in charge of its business left his truck with used cans in it over night in a barn that was not locked. On the day of the accident, both before and after it occurred, another can of the same kind was seen near the place where the children first found the can in question. Very soon after the accident several cans were found within a few miles of the school house and were exploded by means of the glycerin which they contained.

We are of the opinion that the more reasonable conclusion to be drawn from the evidence is that the can in

question was the property of appellant who was responsible for it being where it was found by the children. The court did not err in refusing to direct a verdict.

Appellant insists that the court erred in the admission of certain evidence. Forty witnesses testified on behalf of appellee and several of them were recalled. Their testimony covers about 100 pages of the abstract and appellant, in its brief and argument, fails to refer to the pages of the abstract where its alleged objections and the rulings of the court thereon may be found. For that reason we would be fully warranted in refusing to consider the alleged erroneous rulings, *Wolf vs. Ellison*, 201 App. 138; *St. L. & O. F. Ry. Co., vs. Union Bank*, 209 Ill. 457; *The Fair vs. Hoffman*, 209 Ill. 330. Some of these objections are to the effect that the court erred in permitting witnesses to testify that they found cans after the accident without first requiring appellee to show that they were the property of appellant, or had been in its possession and had been negligently placed by its servants where they were found and that they had contained glycerin. The evidence shows that the cans were exploded by means of their contents and that they had the flat handles. The only reasonable inference to be drawn from the evidence is that they were the property of appellant. Some of the evidence complained of was brought out by appellant on cross-examination of a witness after the court had sustained its objection thereto when offered on direct examination. More of such evidence was not objected to. Appellee proved, without objection, that a few days after the accident there were 65 used cans in one of appellant's sheds with fresh earth on them and that they had the appearance of having been freshly gathered. Even if such evidence were incompetent it may be given such probative value as it naturally carries when not objected to, *Ascher Bros. vs. Industrial Com.*, 311 Ill. 258.

The declaration charged that appellant stored its used cans in places that were in bad repair; that there were openings in the sheds through which persons could enter; that the doors were left unlocked, and that by reason of its negligence in that regard the can in question came to the hands of the children and caused the death of appellee's intestate. The evidence supports the charge and appellant would be liable even though the can were taken from the shed by some one who was not in its employ and left where the children found it, *Olson vs. Gill Home Investment Co.*, 27 L. R. A. (N. S.) 884 and note; 42 L. R. A. (N. S.) 840 and note; L. R. A. 1915 E 479 and note; L. R. A. 1917 A 1290 and note.

Some of the objections are to the effect that the court erred in allowing witnesses to testify to the condition of the can sheds a few days after the accident and that thereafter appellant's agent nailed up the windows. There is no pretense that there was any change in the condition of the sheds between the time of the accident and the time they were examined by the witnesses. Such evidence was admissible as tending to show their condition at the time of the accident, *City of Chicago vs. Dolb*, 115 Ill. 386; *J. S. E. Ry. Co. vs. Southworth*, 135 Ill. 250. If there was any evidence to the effect that appellant made repairs after the accident it was incompetent but no such evidence was pointed out and we have not found it. We do find that appellant proved by the witness Dunlap that one can house was in bad order and that appellant built a new one after the accident. It has no cause to complain in that regard.

Complaint is made in regard to the testimony of the witness Wilton. He testified that Mr. Townsend, an agent of appellant, drove his car along the road near the home of the witness; that he got out of the car and went over in the field and walked back and forth three or four

times. If the admission of that evidence was error it was harmless.

It is argued that the court erred in allowing the witness Marlette to testify that on Friday after the accident he saw Elmer Grimes, an employee of appellant, looking for a can near the school house where the can in question was found and that Grimes said to him: "It is a damned shame we didn't find the other one before this happened." The court erred in its ruling in this regard. The declarations of Grimes were clearly incompetent. Appellant called Grimes as a witness and proved by him that he was looking for a can at the time stated by Marlette and that he told Marlette that it was a shame the kids got hold of that can but that he did not use the language above quoted. The error was insufficient to require a reversal. It is argued that the court erred in allowing the witness Tanquary to testify that on the day of the accident and after it occurred he saw a can in the field just west of the school house. The abstract shows no objection to that testimony.

Appellant contends that the court erred in giving appellee's second, sixth and seventh instructions. The sixth was approved in the Bunyan case *supra*. The other two informed the jury that one who owns and handles a dangerous explosive, such as nitro-glycerin, is required to exercise the highest degree of care and caution to keep it from doing injury to others. The only objection urged is that the term "highest degree of care" is too indefinite and left the jury to speculate as to the care required. We are not impressed with the suggestion. We are satisfied that justice has been done and the judgment is affirmed.

AFFIRMED.

NOT TO BE REPORTED IN FULL.

4606a

238 I.A. 649
Agenda No. 24.

Term No. 19.

IN THE
APPELLATE COURT OF ILLINOIS,
Fourth District

Opinion filed 9/24/1925

OCTOBER TERM A.D. 1924.

M. & M. Motor & Implement
Co., a Corporation of the State
of Missouri,
Appellee.
-vs-
Weber Implement & Automobile
Company, a Corporation,
Appellant.

Appeal from
City Court,
East St. Louis.

*J.A. O'Connor
for Appellant.*

*Ralph Cook
for Appellee.*

OPINION by Higbee, P.J.

This is a bill for an accounting filed by the M. & M. Motor and Implement Company, appellee against Weber Implement and Automobile Company, appellant. Appellee is a Missouri corporation located at Caithersville, Pemiscott County, Missouri. Appellant is an Illinois corporation, located at East St. Louis. The bill alleged that on August 1, 1918, appellee entered into a verbal contract with appellant whereby appellee was to act as appellant's representative for the purpose of handling and selling any and all automobiles, automobile parts, implements, implement parts and for repairing any and all implements and automobiles of appellant when so required; that appellee was to receive 4% commission on the sale of all implements and automobiles made by appellee or appellant in said Pemiscott County, and 20% commission on all sales of implement and automobile parts; and that appellant was also to pay appellee the actual costs and expenses of all labor and work done in repair

*Hon. Ralph Cook
for Appellee*

tion for Custodian Denied 5/2-1925

ing farm implements and automobiles when required by appellant. The bill prayed for an accounting under this contract.

Appellant by its answer admitted the making of this contract, and that appellee was to receive the 4% commission as compensation for handling and selling all implements and automobiles sold and handled by appellant in that county, provided appellee gave service to customers and furnished storage room for appellant's automobiles, but denied that appellee was to receive 20% on the sale of parts. Appellant also contends that appellee was to store all its automobiles, but failed and refused so to do and by permitting the same to stand out in the weather damaged appellant in a large sum in excess of any amount due appellee as commissions on the sale of automobiles and implements.

In answer to this contention appellee insists that it was to store only five cars under the contract and that it complied with this requirement. It appeared that in the first instance and sometime before the verbal contract here under consideration was entered into, the Pemiscott Motor Company was appellant's representative at Caruthersville. Later Shaw & Wolf succeeded this Company and appellee was the successor to Shaw & Wolf. It is contended by appellant that appellee took over the Pemiscott Motor Company's written contract, changed only as to the commissions to be received by appellee. The cause was referred to the Master in Chancery to report his conclusions as to both law and fact. The Master found that under the contract appellee was to store only five automobiles and did so. He further found that appellee was entitled to 4% commission on the sale of automobiles and implements and 20% on sale of parts, that appellee was also entitled to the actual cost of all repairs done at request of appellant and he refused to allow appellant's claim for damages on account of cars not stored. Objections were filed to this report and overruled by the Master.

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Exceptions filed to this report in Court were also overruled by the Chancellor and a decree rendered in accordance with the findings of the Master in Chancery, against appellant in the sum of \$1610.30. It is contended by appellant that the evidence does not show appellee was entitled to \$407.22 allowed by the court for repairs; that it was not entitled to any commissions allowed on sales of machinery parts, or machinery or on automobiles or automobile parts sold by appellant and delivered to other representatives in said county of Pemiscott, none of which were handled or stored by appellee, and further that the evidence shows appellant was not entitled to the damages claimed for the cars which appellee did not store.

The evidence is very voluminous and it would serve no good purpose to discuss the same at length in this opinion. It does not appear to us that the evidence discloses that appellee was to take over the old Pemiscott Motor Company contract. At the time the contract was originally entered into appellee was not incorporated. The contract was actually made between one of the subsequent incorporators of appellee and one C. D. Robinson, who at that time was a representative of appellant, and later became one of the incorporators of appellee, but afterward disposed of his interest in appellee corporation. The evidence clearly shows that during the time the contract was acted under by the parties thereto, appellee at all times stored at least five automobiles. It also clearly shows that other automobiles were allowed to stand outside, which fact was well known to appellant, and that after knowing that these automobiles were standing outside appellant made a payment to appellee of what it then claimed was due it without any claim for damages to such automobiles. We find but little, if anything in the old Pemiscott Motor Company written contract which applied to appellee under its contract with appellant and we further find that the evidence sustains the report

[illegible][illegible]

of the Master in Chancery and the findings of the Chancellor that under the contract appellee was to store five automobiles and did so, was to receive 4% commissions on the sale of the automobiles and machinery and 20% commission on the sales of automobile and machinery parts, and was to be paid the actual cost of work done at appellant's request. Under this state of facts appellee could not be held for damages resulting to automobiles not stored. We also conclude that under these facts the statement of account as made by the Master in Chancery and approved by the Chancellor is supported by the evidence, and the decree is therefore affirmed.

AFFIRMED.

Not to be reported.

1950

APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT.

OCTOBER TERM, A.D. 1924.

Dorris Motor Car Company,

Appellant.

-v-

C. H. Auten,

Appellee.

Appeal from City Court of
Alton.

Opinion by Higbee, P.J.

238 I.A. 649

The Dorris Motor Car Company, appellant, brought an action in replevin against C.H.Auten, appellee, and one Floss for the possession of a certain Federal truck. The suit was dismissed as to Floss and on a trial before a jury in the city Court of Alton, a verdict was rendered in favor of the defendant. This appeal has been perfected to reverse the judgment entered on that verdict.

It appears from the record that appellant, a corporation, of Missouri, with its place of business in St.Louis on August 8th., 1922, sold the truck in question to one Leroy Johnson. Three hundred twenty dollars of the purchase price remained unpaid, and Johnson executed to appellant a chattel mortgage on the truck, to secure the payment of eight promissory notes of forty dollars each, due serially on the 8th, day of each month thereafter until the debt was fully paid. Johnson paid all but the last four of these installments and must therefore have defaulted in payment on January 8th, 1923. Appellant then began search for the truck and found it in possession of Floss who had bought it from appellee Auten, who in turn had acquired it from Johnson in a trade for another truck, on November 2nd, 1922. Statutes of the State of Missouri relating to the

*Opinion filed Feb 9th 1925
cc. William & Kathryn for appellant
Helen M. Brown for appellee*

Hon. L. D. Jager Trial Judge

Rehearing denied 3/24-1925

of the defendant, this appeal has been
judgment entered on that
and that appellant, a
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appellant a chattel mortgage on the
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execution, acknowledgement and recording of chattel mortgages were introduced in evidence. The statutes introduced in evidence provided that chattel mortgages or deeds of trust on chattel property should not be valid against any other person than the parties thereto unless possession be delivered to and retained by the mortgagee or unless the mortgage or deeds of trust be acknowledged or proved and recorded in the county in which the mortgagor resides. The evidence is not clear as to ^{where} Johnson lived at the time of the execution of this mortgage, whether in St. Louis, Missouri or at Golden Eagle, in Calhoun county, Illinois. The Mortgage was filed for record on the 9th day of August 1922. Various witnesses testified that Johnson came to Golden Eagle in Calhoun county, Illinois, with the truck in question either the last day of July or the first day of August, 1922 and there engaged in hauling apples and other use. Appellee testified that before making the deal with Johnson for the truck, learning that he lived in Calhoun county, Illinois, he, appellee, investigated the records of that county and found no chattel mortgage against the truck on record. The evidence showed that the chattel mortgage was acknowledged before a notary public in St. Louis, Missouri. The statutes of Missouri introduced in evidence do not clearly show that notaries public are authorized to acknowledge chattel mortgages in that state. While it is true as contended by appellant that the doctrine of comity between states requires that a chattel mortgage on personal property, if valid in the state where made, shall be considered valid in any state to which the property may be removed, yet the Supreme Court of this state in Davis v. Rosebaum, 179, Ill. 112, held that this doctrine should not be extended to the detriment of citizens of this state. With this doctrine in view this chattel mortgage was not entitled to be admitted as evidence in this case in any event, unless it clearly appeared that the same was duly executed as required by the laws of the state of Missouri and the burden was on appellant to make such proof. The evidence does not clearly disclose that notary publics are

entitled to acknowledge chattel mortgages in Missouri, which method of acknowledgment would be contrary to the laws of this state. It does not clearly show that this mortgage was recorded as required by the laws of the state of Missouri in the county where the mortgagor resided at the time it was executed, for the reason that there was a sharp controversy in the proof as to Johnson's place of residence at that time from which the jury might well have found that he then lived in Calhoun county, Illinois. The evidence showed that appellee made diligent investigation as to the existence of a chattel mortgage in Calhoun county, Illinois where appellee claims Johnson then resided. For these reasons we are of the opinion that the chattel mortgage in question was not sufficiently authenticated to admit it in evidence over the objection of appellee.

The court in behalf of appellee instructed the jury as to the requirements of the laws of Illinois with reference to the recording of a chattel mortgage in the county in which the mortgagor resided and the giving of this instruction is urged by appellant as error. We are of the opinion that the giving of this instruction was proper as bearing upon the question whether appellee was diligent in investigating as to whether there were any chattel mortgages against this property in the county in Illinois where appellee claimed, and there was proof to show Johnson then resided. The verdict of the jury is supported by the evidence and no reversible error appears in the record.

The judgment is therefore affirmed.

AFFIRMED.

Not to be reported.

*via
Seried*

4608

238 I.A. 649³

TERM NO.68.

AG.NO, 31

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

*Kramer, Kramer & Campbell
attys for Appellant.*

OCTOBER TERM , A. D. 1924.

*McGlynn & McElynn
attys for appellee*

HELEN McHALE,
Appellee.
vs
JAMES A. McHALE,
Appellant.)

Appeal from Circuit Court
of
St.Clair County.

*handed down & filed
Feb 9th - 1925.*

OPINION BY HIGBEE , P.J.

Helen McHale, appellee, filed her declaration against James A. McHale, appellant, to the January Term, 1924, of the Circuit Court of St. Clair County. The declaration consisted of one count alleging in substance that on April 21, 1923, appellant was the owner of a Ford sedan which he contemplated driving to Springfield, Illinois, and at his invitation, appellee became a passenger in said Ford sedan, as an invitee of appellant; that it then and there became the duty of appellant to exercise reasonable and proper care in the operation and control of his automobile so as to not intentionally expose appellee to danger; that notwithstanding said duty and while appellee was exercising due care and caution for her own safety appellant so carelessly, improperly and negligently drove and operated his automobile as to cause the same to leave the public highway at or near a curve and run into a ditch, whereby appellee was violently thrown against parts of the automobile and

*Nov. 9. d. Crow
Trial Judge.*

Petition for Writ of Certiorari Seried June 26 24 1925

was violently thrown against parts of the automobile and to the ground, and her right eye was so badly cut, lacerated, bruised and injured that it had to be removed, and that she suffered other severe and serious injuries. Appellant filed the general issue. On the trial a verdict was returned for appellee in the sum of \$5000.00, and this appeal has been taken by appellant to reverse the judgment entered on that verdict. The evidence shows that appellee and appellant are sister and brother who reside with their father and mother in East St. Louis and had, at the time in question, a married brother living in Springfield, Illinois. Appellee was in ill health and she and her mother contemplated soon going to California. Appellant suggested that before they left, ~~he~~ would take appellee and their parents to visit their brother in Springfield. They accordingly left East St. Louis for the purpose on the day in question about three o'clock in the afternoon. At about 7 o'clock P.M. when within about 7 miles of Springfield appellant passed another automobile going in the same direction. He testified that in passing the other automobile he dimmed his light so that the other driver might not know he was intending to pass. When he had passed the other car he turned back to the right hand side of the road and then discovered that he was immediately at a curve of the road to the left. He turned his car sharply to the left when, as he stated, it started to "tilt". He then turned the car sharply to the right and ran off the pavement into the ditch. The road over which he was traveling was the State Concrete Road from East St. Louis to Springfield. Appellee suffered very serious injuries including the loss of her right eye. Appellee, her mother and father and the driver of the car which appellant was passing testified in

behalf of appellee. At the close of appellee's testimony appellant moved to exclude all the evidence offered from the jury on the ground of a variance between the allegations of the declaration and the proof. This motion was overruled by the Court. Appellant also offered the usual motion for a peremptory instruction, which was denied.

Attorneys for appellant devote almost their entire argument to the assignment of error that the trial court erred in denying his motions, to exclude the evidence and for a peremptory instruction. It is first insisted that it was error for the trial court to deny these motions for the reason, as it is claimed, that there was a material variance between the allegations of the declaration and the proof. The particular allegation in the declaration which it is contended is at variance with the proof reads as follows, that "at the invitation of the defendant, plaintiff became a passenger in said Ford sedan as an invitee of the defendant, and plaintiff says that it then and there became and was the duty of the defendant to exercise reasonable and proper care in the operation and control of said Ford sedan", so as not to unduly expose the plaintiff to danger while riding therein. It is contended that the common acceptance of the word "passenger" is entirely different from the legal acceptance thereof and that the legal acceptance of that word uniformly implies a relationship of a carrier to a passenger, and that the legal effect of the allegation under consideration was to impose the wellknown duty of a carrier to a passenger, namely, that of exercising the highest degree of skill compatible with the circumstances, upon appellant; that the proof clearly shows that appellant was not a carrier of passengers and therefore not under the

extraordinary liability of a common carrier; that on the other hand the proof shows that appellant and appellee were merely traveling together in an automobile owned by appellant with the common object of visiting their brother, and therefore the allegations of the declaration and the proof are at variance as to the degree of care imposed upon appellant by the circumstance. We are of the opinion that this distinction claimed to exist by attorneys for appellant is without merit. There is no allegation in the declaration that appellant was engaged in the carrying of passengers for hire which is the usual allegation in a declaration against a common carrier or a person engaged in the transportation of persons for hire. Neither is there any allegation that for a consideration appellant permitted appellee to become a passenger and for that consideration agreed to transport appellee from East St. Louis to Springfield. There is no allegation direct or inferred that appellee became a passenger for hire, but there is the direct allegation that she became a passenger "as an invited" and there was the express allegation, that it then became appellant's duty to exercise reasonable and proper care. It was neither necessary nor proper that the declaration in this case allege the duty owed by appellant to appellee. It was only necessary, as has been often held by the courts of this state, that the declaration should allege the facts from which the court may see that appellant owed appellee a duty and what that duty was. The facts set out in the declaration clearly show that appellee was an invited guest of appellant and in that sense only a passenger and not a passenger for hire, and therefore there was no real variance between the declaration and the proof.

Attorneys for appellant in the second division of their argument contend that the trial court erred in refusing to give the following instruction offered in behalf of appellant. "The Court instructs the jury that under the circumstances in this case under the law it was as much the duty of the plaintiff, if she had the opportunity to do so, as it was the duty of the defendant to learn of danger and to avoid it if practical, and if you believe from the evidence in this case that the plaintiff, by using her faculties with ordinary and reasonable care in looking out for danger and in determining whether or not the automobile was defective, could have avoided injury to herself upon the occasion in question, and if you further believe from the evidence that plaintiff did not use such faculties with ordinary and reasonable care in looking out for danger, then the plaintiff cannot recover in this case and your verdict should be one finding defendant not guilty." This instruction among other things advised the jury that it was the duty of appellee as much as of appellant to "determine whether or not the automobile was defective". There was no evidence whatsoever tending to show that the automobile was in any way defective. Even if the remainder of this instruction were proper, it was not reversible error for the court to refuse to give the instruction containing the above language not based upon any evidence in the case.

Attorneys for appellant further insist that it was error for the trial court to refuse to direct a verdict in its favor for the reason that the evidence failed to prove or tend to prove negligence upon the part of appellant. If there was any evidence tending to prove such negligence it was proper for the court to refuse this motion. In our

opinion not only was there evidence tending to prove such negligence, but the evidence in fact clearly showed that appellant was negligent/^{in his manner} of passing the other car with his lights dimmed and at a rate of 20. to 25 miles per hour at a place on this road where there was a curve with which he was not familiar.

Appellant was driving and sitting in the driver's seat on the left hand side of the machine. His father was occupying the other front seat. Appellee was sitting directly back of her father and the mother sat back of appellant. The claim of appellant that the evidence shows appellee was not exercising due care in her own behalf for the reason that she did not caution appellant, is not well founded, as the evidence shows she was not in position, at the hour of the day to see just what appellant was doing nor the circumstances surrounding her.

Lastly appellant states that the verdict is against the law and clear preponderance of the evidence. Most of the matters discussed under that division of the argument have been hereinbefore considered by us in this opinion. There is no dispute but that appellee was severely injured while exercising due care for her own safety. Under the allegations of the declaration, the facts in proof and the law, she was entitled to ordinary care on the part of appellant. The proof shows conclusively that he was guilty of negligence which resulted in the accident and appellee's injuries. The judgment is therefore affirmed.

AFFIRMED.

not to be reported.

[illegible]

TERM NO.70.

AG.NO.34.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM A.D. 1924.

HOUSTON B. MOORE,
Appellee.

vs

THE STANDARD ACCIDENT
INSURANCE COMPANY,
Appellant.

Appeal from MADISON.

OPINION BY HIGBEE, P.J.

Appellant insured appellee in the principal sum of one thousand dollars and a weekly indemnity of twelve dollars and fifty cents against loss resulting from bodily injuries, effected directly, exclusively and independently of all other causes through external, violent and accidental means. The policy provides that if such injury should directly and immediately totally and continuously disable and prevent him from performing any and every kind of duty pertaining to his occupation, appellant would pay him twelve dollars and fifty cents per week for the entire period during which he is so disabled and under the treatment of a legally qualified physician or surgeon by reason of such disability.

Appellee was a railroad section man. He was seriously injured ^{on} September 13, 1921, when the car upon which he was riding was accidentally derailed. Appellant recognized the liability and paid the weekly indemnities until April 24, 1922 when it ceased to make further payments. Appellee then filed suit to recover the weekly payments up to November 29,

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238 I.A. 649

Opinion filed Feb 9th 1925

Nov. 9. 1924
Trial Judge

Re-hearing denied
3/24/1925

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1922 and secured judgment. Upon appeal to this court that judgment was affirmed by an opinion filed March 10, 1924. This suit was brought to recover the weekly indemnities from November 29, 1922, the date to which they were recovered in the former suit, to March 19, 1924. Judgment was entered in favor of appellee in the sum of \$862.50 and this appeal was perfected from that judgment by appellant.

In the former suit appellant insisted that appellee was not entitled to recover because he/^had failed to prove that during the period covered he was under/^{the}treatment of a legally qualified physician or surgeon on account of such disability. The same defense is also relied upon in this case. No other questions are raised in this case save that the weekly indemnity sued for covers a different period of time. The evidence shows that most of the time since the trial of the former suit appellee has been in the State of Texas, but that during this time he occasionally returned to his former home in this state and when he did so he went to see Doctor Haven, the doctor who first treated him; that while he was in Texas this same doctor at times either sent him or furnished to his family to be sent him, medicine to relieve his pain. The evidence clearly shows that appellee is totally and permanently disabled from following his occupation.

In our opinion this evidence shows that during the time covered by this suit appellee was in legal contemplation, as announced in our opinion in the former case, under the care of a legally qualified physician, by reason of his disability even though no treatment was administered. It is contended that it was improper to permit the doctor to testify that further treatment would be of no benefit. This evidence

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under our holding in the former case, to the effect that actual treatment by a physician is not required in a case such as this where it is shown that no treatment of value could be given.

There being no new question raised in this case, Which would require a departure from our holding in the former case above referred to, between the same parties, this judgment should be and is therefore affirmed.

AFFIRMED.

Not to be reported.

There is a great deal of
work to be done in the
field of the study of the
history of the people of
the world. It is a task
which requires the most
careful and thorough
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238 I.A. 649

Term No. 21.

Agenda No. 12.

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A.D. 1924.

FRANCIS MANCUSO,

Appellant,

-vs-

EDWARD DEIMLING, Sheriff of
Madison County, and
C. H. Auten, doing business
as C. H. Auten and Company,
Appellees,

Appeal from the

Circuit Court of

Madison County.

OPINION-by-Beggs, J.

An action in replevin was instituted by appellant against appellee in the circuit court of Madison County to recover possession of an automobile truck, claimed by appellant as her property, and which had been seized by appellee, Edward Deimling, Sheriff of said county, under an execution in favor of appellee, based upon a judgment against Frank P. Mancuso, appellant's husband. The declaration, consisting of one count, is an ordinary declaration in replevin, to which was filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee. To reverse said judgment, this appeal is prosecuted.

It is first contended on the part of counsel for appellant that the verdict of the jury is against the manifest weight of the evidence.

The evidence on the part of appellant tended to prove that she was operating a grocery store in Alton, under the name of "F. Mancuso Grocery;" that her husband, Frank P. Mancuso, was acting as her manager, but had no financial interest in said store; that some time in the month of June, 1922, appellant purchased

Opinion filed Feb 9th 1925
Arthur Stahl for appellant
Hiles, Newell & Brown for appellee

Am. J. F. Gillman Trial Judge

Re-hearing denied 3/24-1925

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from appellee Auten, doing business as C. H. Auten & Co., the truck in question, and that the contract and memorandum of sale issued by appellee Auten at the time of said transaction, were executed on behalf of appellant in the name of F. Mancuso Grocery. The evidence on the part of appellant is further to the effect that as part payment on said truck, a used truck belonging to appellant was taken in by appellee Auten at a value of \$500.00, and that thereafter three checks, each in the sum of \$109.69, payable to the order of C. H. Auten & Co., were given by appellant to appellee Auten in further payment on said truck, and that the same were signed, "F. Mancuso Grocery, per Frank P. Mancuso, Mgr."

On the other hand, the evidence on the part of appellee is to the effect that the sale of the truck in question was made by appellee Frank P. Mancuso, appellant's husband, and that Mancuso executed a promissory note, payable to the order of C. H. Auten & Co., for the sum of \$1,352.27, and that a chattel mortgage on said truck was issued to C. H. Auten & Co., securing said note; that the checks heretofore referred to were originally drawn by Frank P. Mancuso, and that after they had cleared through the banks and were returned to Mancuso, the signatures on the checks were altered by prefixing to the name "Frank P. Mancuso," the word "By," and adding thereafter the designation, "Mgr." The record discloses that the words "F. Mancuso Grocery" appeared on each of the checks, above the signature of Frank P. Mancuso.

The main issue in this case is whether or not the truck in question was the property of appellant or the property of her husband, Frank P. Mancuso, at the time said levy was made by the sheriff. Counsel for appellant contends in his argument that even though Frank P. Mancuso gave his personal note and the checks offered in evidence for the purchase of said truck, that the bill or memorandum of sale admitted in evidence discloses that the title to the truck was conveyed directly to appellant. This contention

The following information was obtained from the records of the Federal Bureau of Investigation at New York City:

[REDACTED]

is based solely upon the fact that, following the description of the truck, the enumeration of the accessories to go with the truck, etc., and the amount to be paid thereafter, appear^s/this statement: "Payment of 12 equal payments, amounting to 105 with 6% interest for amount of note. To start on delivery of truck to Mrs. Mancuso." Auten, however, testified in this connection that the designation "Mrs." had been subsequently substituted on the instrument in place of the initial "F." making it read Mrs. Mancuso" where originally it read "F. Mancuso."

The issue as to whether or not there had been a change made on this instrument after its delivery was, with all the other evidence in the case, submitted to the jury for their determination. and after a careful examination of the record we are of the opinion that the jury were fully warranted in finding that the truck in question had been sold directly to the husband of appellant, and that he had assumed payment therefor by giving the note on which the judgment was entered, which is the basis for the execution under which said truck was levied upon by said sheriff. The court did not err in refusing to grant a new trial, on the ground that the verdict was against the manifest weight of the evidence.

It is next contended by counsel for appellant that the court erred in admitting testimony with reference to the execution of a chattel mortgage by Frank P. Mancuso, securing the note in question. The testimony to the effect that a chattel mortgage was given, was not objected to, and the note in question, signed by Frank P. Mancuso, was admitted in evidence without objection in the first instance. This being the state of the record, we are of the opinion and hold that the court did not err in further allowing a carbon copy of said chattel mortgage to go to the jury, as the testimony was to the effect that it was a true copy. At any rate, on this record, appellant was not prejudiced by said ruling,

[illegible]

as we are of the opinion and hold that the evidence in the record clearly supports the finding of the jury.

No complaint is made in the argument of counsel as to the rulings of the court on the instructions. It is not disputed that the amount of this judgment is for the amount that is owing as a balance on the purchase price of said truck.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

Not to be reported.

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APR 17 1925

TERM NO.6.

AGENDA NO.1.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

FILED

MARCH TERM, A.D.1925.

APR 17 1925
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

THE PEOPLE OF THE
STATE OF ILLINOIS.
Defendant in Error.
vs
CATTANI UGO,
Plaintiff in Error.

238 I.A. 650¹

ERROR TO THE COUNTY COURT
OF
FRANKLIN COUNTY.

BARRY, J. Plaintiff in error was convicted for violation of the Prohibition Act. The first three counts of the information charged him with unlawfully selling intoxicating liquor; the fourth charged him with the unlawful possession of intoxicating liquor with intent to sell the same for beverage purposes; and the fifth, with unlawfully keeping and maintaining a common nuisance. There was a verdict of guilty on each count and he was sentenced to pay a fine of \$100.00, under each of the first four counts and was sentenced to the Illinois State farm for one year under the fifth count. The Court also ordered that at the expiration of the latter sentence, if he had not paid the fines and costs assessed against him, he should remain committed to the said farm until he had worked out the said fine and costs at the rate of \$1.50 per day. He sued out a writ of error from the Supreme Court and the cause was transferred to this court, People vs Ugo, 315 Ill. 74.

Plaintiff contends that the Court erred in overruling his motion for a continuance. If the Court made such a

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R. C. Smith Atty for Plaintiff
W. C. Martin State Atty for Defendant
Hon. S. M. Ward Judge County Court

ruling it should have been preserved in the bill of exceptions. That portion of the affidavit in support of the motion, setting out what the absent witness would testify to was admitted in evidence. Defendant in error was not bound to admit the truth thereof but simply that if the absent witness were present she would so testify, unless otherwise ordered by the Court, Callaghans Illinois Statute Annotated, chapter 38, page 759. Had the ruling been properly preserved there was no error in that regard.

If the Court overruled a motion to quash the information it is not shown in the abstract. Errors relied upon must be shown therein. The Fair vs Hoffman, 209 Ill. 330; Gage vs City of Chicago, 211 Ill. 109. There was ample evidence to support each count of the information and the Court did not err in admitting the liquor in evidence. It is argued that plaintiff was convicted and fined for selling certain liquor and also for possessing the same liquor; that he was punished twice for the same offense. There is no force in that contention as there was evidence from which the jury could find that he possessed liquor other than what he sold.

It is suggested that there was a fatal variance between the allegations of the information and the proof in that it was averred that the liquor was sold for beverage purposes while the proof shows that it was bought in order to procure evidence to secure a conviction. There was no variance. The offense consisted in selling it for beverage purposes and it was immaterial that it was bought with the intention of preserving it as evidence. The great weight of authority, supports the view that a persona making an unlawful sale of liquor is not excused ^{from} criminality by the fact

that the sale is induced for the sole purpose of prosecuting the seller, City of Evanston vs Meyers, 172 Ill. 266; 18 A. L. R. 162 Note.

Section 2 of the Illinois State Farm Act provides that in all cases in which a Court is now or hereafter authorized by law to sentence male offenders above the age of 16 years to jail, or to commit such offenders to work out fine and costs, such Court is authorized in its discretion, if the sentence is for sixty days or more, to commit or sentence to the Illinois State Farm. Plaintiff insists that the Court was without authority to sentence him to the Farm in the absence of a finding by the jury that he was a male over 16 years of age. Section 2 of the Parole Act has no application and it was not necessary that the jury should make such a finding. Plaintiff does not suggest that he is a female or that he is under 16 years of age.

It is insisted that the Farm Act aforesaid only authorizes the Court to order a defendant to work out his fine in cases where there is also a jail sentence of 60 days or more; that as there was no fine on count five and no jail sentence on the other counts the Court was in error in requiring plaintiff to work out his fine at said Farm. If the limitation of 60 days applies to a case where a defendant is committed for nonpayment of a fine and the fine is large enough to require his detention for more than 60 days at \$1.50 per day, then it may be said that the sentence is for more than 60 days and is within the statute.

When a defendant is convicted of a misdemeanor and fined, the Court may order, as a part of the judgment, that he be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law, Callaghan's Ill. St. An. ch. 38, par. 787 and the Court may also require

him to work out his fine and costs at \$1.50 per day, par
384. It is quite clear therefore, that this is a case where
the Court was authorized by law to require plaintiff to
work out his fine and costs. That being true the Court
was expressly authorized by Section 2 of the Illinois State
Farm Act to commit him to said Farm and to there require him
to work out his fine and costs. There was no error in re-
quiring him to work out his fine and costs, unless paid, after
the termination of the jail sentence, Berkenfield vs People,
191 Ill. 272.

Finding no reversible error in the record the judg-
ment is affirmed.

AFFIRMED.

not to be reported.

STATE OF ILLINOIS.

APPELLATE C COURT

4TH. DISTRICT.

MARCH TERM A. D. 1925.

FILED

APR 13 1925

Robert S. New
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 7.

AGENDA NO. 2.

238 I.A. 650

THE PEOPLE OF THE
STATE OF ILLINOIS,

Defendant in Error.

vs.

GEORGE F. MASH,

Plaintiff in Error.

ERROR TO

COUNTY COURT

OF WASHINGTON COUNTY.

OPINION BY MERRY, J.

Plaintiff in error was convicted of a violation of the Medical Practice Act. He was found guilty under the first and fifth counts of the information. The first count charged him with having prescribed certain forms of treatment for human ailments, and the fifth with having practiced medicine without a license. The information was filed under Calligan's Ill. St. Ann. ch. (9I par. 25. Plaintiff was fined \$100.00 and costs on each of said counts. He had an office in DuBois where he had a stock of herbs consisting of more than 500 varieties and says that the firm from which he purchased a part of them gave him a book which informed him as to what combinations were proper for various ailments.

The evidence discloses that he combined certain herbs and recommended the combination for various ailments and in some instances examined the patients and went to the home. He frequently gave verbal directions as to how the medicine should be taken and charged \$20.00 for what he did and the medicine furnished. In medicine to "Prescribe" remedies is defined to be, "to write or give medical directions; to indicate remedies." It may be given or indicated verbally, People vs. Mash, decided by this Court at the Oct. Term 1924; State vs. Lawson, 65 Atl. (Del) 593; State vs. Lawson,

L. G. Cranston Atty. for Plaintiff
H. H. Howe State Atty. for Defendant

Hon. J. P. Green Judge County Court

69 Atl. (Del) 1066; In re Bruendl's Will, 102 Wis, 45, 78 N. W. 169
See also Smith vs. State 63 So. (Ata) 28; State vs. Huff, 90 Pac.
(Kas) 279. Under the evidence and the foregoing authorities there
was sufficient evidence to warrent the jury in finding a verdict
of guilty.

Complaint is made of the sixth and seventh instructions
given on behalf of defendant in error. The instructions are pract-
ically in the language of the statute but are broader than the char-
ges in the information. They should have been limited to the issues
The jury found plaintiff guilty under the first and fifth counts
and as the evidence amply supports the verdict the error in the
instructions aforesaid was harmless. Finding no reversible error.
in the record the judgment is affirmed.

AFFIRMED.

Not to be reported.

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STATE OF ILLINOIS

APPELLATE COURT

4TH. DISTRICT.

MARCH TERM A. D. 1925.

FILED
APR 15 1925CLERK OF THE APPELLATE COURT
FOURTH DISTRICT ILLINOIS

AGENDA NO. 3.

238 I.A. 650³

TERM NO. 10.

FRANK McCoy,
Appellee.
vs.STATE BANK OF YALE,
Appellant.APPEAL FROM
JASPER CIRCUIT
COURT.

OPINION BY BARRY, J.

Appellee sued to recover \$554.00 alleged to have been deposited with appellant on February 23rd, 1924. In the special counts of his declaration he relied upon a certain deposit slip showing that he made the deposit on that day. The declaration also contained the common counts. Appellant pleaded the general issue and payment and also filed a verified plea denying execution of the deposit slip. The trial resulted in a verdict and judgment for \$554.00.

It was conceded by both parties on the trial that appellee made a deposit of \$554.00 on September 28, 1923 and that there was a deposit slip therefor dated 9/28.23. Appellant contended that its cashier then gave appellee a duplicate slip which has been changed to read 2/23/24 and for \$554.00. It insists that the Court erred in admitting the deposit slip in evidence because alterations were apparent on the face thereof and appellee had made no satisfactory explanation of such alteration. Appellee testified that he went to appellant's bank on Feb'y. 23, 1924 with \$554.00 in cash and delivered the same to the cashier for deposit to his account. He says that the cashier told him that his passbook was locked up and that he would give him a duplicate deposit slip; that the slip in question was then handed to him by the cashier and is in the same con-

Kasserman Kasserman Atty for Appellant
Daly & Worthington Atty. for Appellee
Hon. F. R. Love Judge Circuit Court
Filed 5/19-1925

dition as when he received it. We are at a loss to know what other explanation could be made. If his testimony is true the deposit slip was not altered after it was delivered to him.

Appellant's cashier testified that he did not see appellee in the bank on February 23, 1924; that he did not receive from appellee \$554.00 on that day and did not on that day issue the duplicate slip in question. He says that he did issue a duplicate deposit slip for the deposit made September 28, 1923 for \$554.50 under date of 9/28/23 for \$554.50 that it is the same slip offered in evidence by appellee except in the date the month is changed from 9 to 2, the day of the month from 28 to 23 and the year from 23 to 24 and the amount of the deposit from \$554.50 to \$554.00. It will be seen, therefore, that there was a decided conflict in the testimony of the only witness who knew the facts. No complaint is made as to the court's rulings on the instructions. There is nothing in the record that would warrant us in holding that the verdict is manifestly against the weight of the evidence. If the verdict had been the other way it would have to stand. The judgment is affirmed.

AFFIRMED.

Not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.
MARCH TERM, A.D. 1925.

FILED
APR 15 1925
PETER B. ROY
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

O.C. MUNSEY and GEORGE R. MOUNSEY,
Appellants.

vs

LENERD HIRSCH and JACOB HIRSCH,
Appellees.

APPEAL FROM PULASKI COUNTY

CIRCUIT

COURT.

238 I.A. 650

OPINION BY BOGGS, J.

An action in assumpsit was instituted by appellants against appellees in the circuit court of Pulaski County, seeking a recovery of damages on a contract for the sale of certain real estate by appellees to appellants.

The declaration as originally filed consisted of the common counts and one special count. The special count averred, among other things, that on December 29th, 1915, appellees, being the owners of sections 9 and 16, and the southwest quarter and the south half of the southeast quarter of section 4, township 14 south, range 1 east, in said county, entered into a written contract with appellants for the sale of said premises on the terms and conditions therein set forth: that appellants, parties of the second part, in consideration that appellees would cause a partition suit to be filed to the January, 1916, term of the circuit court of said county for the partition of said real estate, covenanted and agreed to be present in person

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G.S. Miller, atty for Appellant
Fred Ford, atty " Appellee
Hon A. C. Somers Judge Circuit Court
Pulaski County, Ill. 7/19-1925

or by agent and bid in said premises at the sale to be made by the master in chancery, should the court decree a sale thereof, at the sum of \$54,400.00, to be paid in installments as set forth in said contract; that said contract further provided as follows:

"And in consideration of the foregoing, the said parties of the second part have this day deposited at the First National Bank of Mound City, Illinois, as an evidence of good faith on the part of the parties of the second part in carrying out their agreement herein, the sum of one thousand dollars (\$1,000.00) as earnest money. It is understood and agreed that if said land is offered for sale as aforesaid and said parties of the second part buy said land at the price herein agreed to be paid for same, the earnest money aforesaid shall be applied by said bank as part payment on the first installment of the purchase price of said real estate; and that should said parties of the second part fail to bid the amount herein agreed upon as the purchase price for said lands at the sale thereof herein contemplated, or in any other manner to fulfill this agreement upon their part, then said earnest money shall be paid over by said bank to said parties of the first part herein as liquidated damages for the default of said parties of the second part. In case said land is not offered for sale in the partition proceedings herein contemplated, or the title to said land proves to be not merchantable, then, in either of such events, the said earnest money shall be returned by said bank to said parties of the second part."

Appellants further averred in said declaration that, pursuant to the terms of said contract, they delivered to the First National Bank of Mound City, as evidence of good faith and "earnest money to bind the bargain and for the use of the

defendants, the said sum of \$1,000.00 and that said First National Bank of Mound City, Illinois, delivered over ^{to} the said defendants the ^{said} sum of \$1,000.00 and never repaid the same to the plaintiffs; that the said lands were offered for sale through the circuit court in accordance with the terms of said contract, and the plaintiffs, relying upon the terms of said contract, fully kept and performed their part of said contract and purchased said land at said sale. That it became and was the duty of said defendants to furnish these plaintiffs with a good and merchantable title to said lands, or to pay and return to them the said sum of \$1,000.00; that appellees had wholly failed and refused to keep and perform said contract, and had failed to deliver to the appellants a good and merchantable title to said lands, although often requested so to do; that appellants were obliged at their own expense to procure abstracts of title to said premises, and thereafter ascertained "that there were a number of conveyances of said lands where the grantors were not joined by their wives; one conveyance which was not properly acknowledged; that said lands were subject to the right of way of the Chicago & Eastern Illinois Railroad Company; that there were outstanding against said lands two mortgages which were and are unreleased; that a portion of said lands was at one time conveyed to Henry G. Carter in trust for Elizabeth Yates, David Yates and C.E. Yates, and so far as said records disclosed the said Elizabeth Yates, David Yates and C.E. Yates still own and possess said interest; that one Emma Rowling still has an interest in said land which has not been conveyed; that a mortgage of fifteen thousand nine hundred and twenty dollars (\$15,920.00) has never been properly released; that another mortgage for seven thousand and two hundred twenty-five (\$7,225.00) has never been properly released of

record; that the sale in the partition suit was not properly made in accordance with the decree of the court and that there were numerous other defects in said title which rendered the same wholly unmerchantable, and these plaintiffs were put to great trouble and expense in endeavoring to clear up the said defects, all of which the said defendants had notice;" and that appellees became and were liable to pay appellants the sum of \$1,000.00, and had failed so to do.

A general demurrer was filed to said special count, and pleas of the general issue and the statute of limitations were filed to the common counts. Upon the court sustaining the demurrer to said special count, the common counts were dismissed. Appellants electing to abide their declaration, judgment was rendered on said demurrer against appellants in bar of action and for costs. To reverse said judgment this appeal is prosecuted.

Appellants contend that, under the terms of said contract, they were entitled to a reasonable time after the purchase of said premises at the master's sale to determine whether or not the title to said premises was merchantable, and that if it developed that the same was not merchantable, they would be entitled to a return of said \$1,000.00 which they had deposited in said bank, or, if said money had been paid over on said purchase price, to have the same returned to them by appellees.

On the other hand, appellees contend that there was no undertaking by them to deliver to appellants an abstract of the title to said premises, and that the provision ^{with reference} to the return of said deposit so to be made by appellants had reference to a time prior to the consummation of said sale, and that upon appellants accepting a deed to said premises from said master pursuant to their bid at said public sale, then, under

the terms of said contract it became and was the duty of said bank to pay over to appellees said sum of \$1,000.00 as part payment on the purchase price of said premises.

We are of the opinion and hold that appellees' position is well taken. An examination of said contract discloses that there is no provision for the furnishing of an abstract by appellees. This being true, there was no obligation on their part to furnish the same. In *Turnvereiniche vs Kionka*, 255 Ill. 392, the court in discussing a question of this character at page 396 says:

"Appellee was under no obligation to furnish an abstract of title. His contract was to make a warranty deed within fifteen days, or sooner if upon examination the title was found good and the balance of the purchase price paid. Nothing whatever is said about furnishing an abstract. Under the terms of the contract it was the duty of appellant to examine the title and determine whether it was good or not." To the same effect is 27 R. C. L. 511. sec. 238.

The only provision with reference to a return of said deposit of \$1,000.00 to appellants is the above quoted sentence: "In case said land is not offered for sale in the partition proceedings herein contemplated, or the title to said land proves to be not merchantable, then, in either of such events, the said earnest money is to be returned by said bank to said parties of the second part." This being the state of the record, we are of the opinion and hold that the trial court correctly construed said contract, and that it was the duty of said bank, under the terms of said contract, to pay over to appellees said deposit of \$1,000.00, made by appellants, upon the consummation of the sale of said premises, and appellants having accepted a deed therefor, they thereby waived any right to a return of the

said \$1,000.00, either by said bank or by appellees, in the absence of an allegation charging fraud on the part of appellees. 27 R.C.L., 530-531, sec. 262. See also Laflin vs Howe, 112 Ill. 253.

There can be no question in this case, from a reading of the contract declared on, but that the \$1,000.00 deposit made by appellants was to be disposed of, under said contract, prior to or upon the sale of said premises by the master in chancery, that is to say, if the title proved not merchantable when the same was examined by appellants prior to bidding on said premises, then the \$1,000.00 was to be returned to appellants. If, however, no objection was made to the title prior to the sale by the master, and the premises were bid in by appellants, then the \$1,000.00 was to be turned over by the bank to appellees as part payment on the amount owing to them on the sale of said premises. The bank having so paid over said \$1,000.00 to appellees as a part of said purchase price, following the purchase of said premises by appellants at the master's sale, the contract between said parties was consummated, and no right now exists in appellants to enforce a return to them of the amount of said deposit, in the absence of a charge and showing of fraud.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.
MARCH TERM, A.D.1925.

FILED

APR 15 1925

CLERK OF THE CIRCUIT COURT
FOURTH DISTRICT ILLINOIS

238 I.A. 650⁵

THE PEOPLE OF THE
STATE OF ILLINOIS.
Defendant in Error.

vs

JOHN FUDORICH,
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT

OF

MADISON COUNTY.

PER CURIAM.

Plaintiff's sole contention is that the indictment does not charge the commission of a criminal offense. The point is well taken under People vs Martin 314 Ill. 110; People vs Barnes 314 Ill. 140 and People vs Wallace 316 Ill. 120. The judgment must be reversed.

REVERSED.

not to be reported.

*J. B. O'Neill & M. L. Burroughs
Attys for Plaintiff
Jesse R. Brown State atty for Defendant
Hon. J. F. Sullivan Judge Circuit Court*

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM A. D. 1925.

Joel Frank Sanker and Rosa Nance,

Appellees.

vs.

Chicago and Eastern Illinois

Railway Company,

Appellant.

238 I.A. 651

Appeal from

Circuit Court,

Franklin County.

OPINION by HIGGINS, P. J.

This is an action brought by Joel Frank Sanker and Rosa Nance, appellees, against the Chicago and Eastern Illinois Railway Company, appellant, and the City of Benton to recover damages to the residence property of appellees alleged to have been caused by the erection of certain embankments which it is claimed diverted water from its natural flow and caused it to stand on the property. The suit was afterwards dismissed as to the City of Benton. The trial resulted in a verdict for appellees in the sum of \$250.00. This appeal was perfected to review the judgment entered on that verdict.

Appellees are the owners of lot II6 in Sunshine Addition to the City of Benton. This lot extends sixty feet north and south and I40 feet east and west. It is improved by a dwelling facing the west. Frisco street runs north and south along the west end of appellees' property. Just south of appellees' property are lots II3, II4, and II5 owned by appellant and south of these lots and intersecting with Frisco street is Joplin street. North of appellees' property is lot II7 referred to in this case as the Lawrence lot. Just north of the Lawrence lot and intersecting with Frisco street is Gardner street running east and west. Just west of Frisco street and running north

Craig & Craig Attys for Appellant

R. B. Smith " " Appellee

Hon. J. C. Kern Circuit Judge

and south are appellant's main tracks. In 1923 and prior thereto the natural drain of these lots east of Frisco street and between Joplin and Gardner streets was from the south or southeast to the north or northwest. That is to say, appellees' lot was lower than the lots of appellant to the south, while the Lawrence lot to the north of appellees' premises was still lower. Thus the water from appellant's three lots drained to the north or northwest across appellees' lots and onto the Lawrence lot and probably left that lot at or near the northwest corner. In 1923 appellant constructed what is referred to as the Franklin County Main Spur Track. This spur or switch track left appellant's main track some little distance north of the intersection of Gardner street with Frisco street and curved to the southeast. It went off of appellant's right of way and crossed the west line of Frisco street a short distance north of the northwest corner of appellees' lot and crossed the east line of Frisco street and entered upon appellant's vacant lot at about the southwest corner of lot II5 being the lot immediately south of appellees' property. This switch track or spur was erected upon a grade several feet high. It is the contention of appellees that the erection of this grade caused the flooding of their property; that prior to the construction of this embankment appellant's section hands had constructed a ditch along the south line of appellees' property and across Frisco street discharging the surface water from this property into an open ditch along the east line of appellant's main track; that the natural flow of the water prior to the construction of this embankment was from the lots of appellant north or northwest across the property of appellees; that when the switch track was constructed the drainage ditch to the south of appellees' property and upon the property of appellant and the ditch along the east side of the main track were obstructed and not restored to their former state, and that the damage to appellees resulted from the obstruction of the ditches.

Appellees base their right to recover in this case upon the fifth clause of the 19th section of Chapter II4 of our Revised Statutes which provides in reference to the rights given a railroad company. "Fifth: To construct its railway across, along or upon any stream of water, water-course, street, highway, plank road, turnpike or canal, which the route of such railway shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road and turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired the usefulness, and keep such crossing in repair; PROVIDED, that in no case shall any railroad company construct a road-bed without first constructing the necessary culverts or sluices, as the natural lay of the land requires for the necessary drainage thereof.

Shortly after the construction of this switch/^{track}the City of Benton constructed a concrete sidewalk along the east side of Frisco street and the south side of Gardner street. These sidewalks were constructed upon a grade slightly higher than appellees' lot and also higher than the Lawrence lot.

Leaving out of consideration the obstruction of the drainage ditch upon appellant's property and just south of appellee's property it is difficult to understand how the construction of this spur track could have caused any more water to be kept upon appellees' property or could have held the water upon their lot since the natural slope of the land and the drainage was from the south to the north or southeast to/^{the}northwest and the spur or switch track in question was to the south and west of appellees' property. It would seem that such embankment would naturally cause less water to come from the south upon appellees' premises.

Since appellees based their right to recover upon the alleged obstruction of the flow of water through the drain ditch to the south of appellees' property, the question is presented as to whether even if such ditch was obstructed and not restored to its

former condition appellees have any right to recover under the statute upon which they base their contention. Attorney for appellees states that this ditch was dug by appellant upon its own property and appellee, Rosa Nance testified that appellant's section hands dug the ditch. However the witness, Lum Shaw, produced by appellant, who seems to be in no wise interested, testified that for four years prior to October 1923 he lived on the lot just across the alley east from lot II5; that he dug this ditch on appellants property just south of appellee's south line; that it extended to the east side of Frisco street and was for the purpose of draining the water from his lot to frisco street. It therefore clearly appears that this ditch was not a natural water course, and even if it was obstructed by appellant in the construction of the embankment in question which the evidence does not clearly show, appellees would have no right of recovery against appellant under the statute mentioned.

We are also of the opinion that the trial court erred in the admission of testimony. This suit was originally instituted against appellant and the City of Benton, and the declaration alleged that appellees' damages were occasioned by the construction of the embankment upon which the spur track was built by appellant and also the grade or the embankment upon which the sidewalk was constructed by the City. Later however, the city was dismissed out of the suit and the declaration amended so as to allege that the damage resulted alone from the wrongful, negligence and careless construction of the ditch track. Neither of appellees testified as to the extent of the damages sustained by them. They placed however three witnesses on the stand who did testify as to the extent of such damages. Each of these witnesses testified that the erection of the grade upon which the sidewalk was built was one of the elements which they took into consideration in determining the amount of the damages. Appellant moved to strike out this testimony upon the ground that appellant

cannot be held liable for any damage caused by the wrongful act of the City of Benton as they were not shown to be joint tort feassors, and that when the wrong complained of consists of two distinct acts performed by two distinct parties at different times each party is liable only for the amount it contributes to the damage sustained and not for any damage caused by the other. This is the correct rule as laid down in the following cases: Hackethal v. East Side Levee and Sanitary District 211 Ill. App. 119; Equitable Powder Mfg. Co. v. C.C.C. & St.L. Ry. Co. 155 id. 265 and Hoffman v. C. & N.W. Ry. Co. 205 id. 197 and C & n. W. Ry. Co. v. Scates 90 Ill. 586. Since under these authorities appellant would, in any event, be liable only for the amount it contributed to the damage sustained by appellees', the witnesses should have been permitted to testify only as to the amount of damages claimed to be resulting from appellant's acts, and it was error to admit evidence as to the total damage claimed to have been sustained by appellees including both that resulting from the act of ^{appellant} and from the act of the City of Benton. The motion to strike out this testimony should have been allowed when it developed that the witnesses were including the damages resulting from the acts of both appellant and city.

For the reasons above stated the judgment in this case will be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

MARCH TERM, A. D. 1925.

EDWARD NANCE,
Appellee.

vs

INTERNATIONAL MUTUAL FIRE
INSURANCE COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF
MADISON COUNTY.

238 I.A. 651

OPINION BY HIGBEE, P.J.

This is a suit brought by Edward Nancee, appellee,
vs International Mutual Fire Insurance Company, to recover
on a fire insurance policy covering appellee's household
goods. The fact of the fire and loss is not disputed. It is
contended, however, by appellee that the proof shows that
appellee did not make ^{out} an inventory of the goods lost
covering the cost price, present value and the amount claim-
ed, and that he did not within sixty days from the date of the
fire furnish proof of loss as required by the policy. Appellee
testified that he did furnish this inventory and proof of
loss. The notary who acknowledged the instrument signed by
appellee in the office of appellant's agent at East St. Louis,
testified that while the blank form of the proof of the loss,
furnished by appellant, was not sworn to by appellee and ap-
pellee would not fill it in, yet a list of goods claimed to

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*J.A. Connor atty for Appellant
P.L. Maher & R.W. Griffith for Appellee
Hon. Louis Bernreuter City Judge*

be lost with their value was worn to by appellee and attached thereto. Appellant denied receiving this list. Whether or not this proof of loss was furnished was a question of fact to be determined by the jury. By the verdict that question was determined in favor of appellee. In our opinion this court would not be justified in setting aside the judgment solely upon that question of fact. There being no error complained of in the trial of the case, the judgment is affirmed.

AFFIRMED.

not to be reported.

MARCH TERM, A. D. 1925.

238 I.A. 651

VB.

Bond County.

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-1-

J. M. Quinn atty. for Appellant
Albert, Matt & Albert - Appellee
Horn H. C. Stubble Judge County Court

certain state of facts. A jury should never give any weight or credit to the testimony of a witness whom they believe to be testifying falsely; that is, the jury should not give any weight or credit to testimony which the jury believe to be untrue". The sixth instruction reads as follows: Q "The court instructs you that if you believe from a preponderance of the evidence that the defendant George Stanbery had sexual intercourse with Florence Elam about the time she conceived the child in question, and that he is the real father of said child, then the fact (if it be a fact) that some other person had sexual intercourse with her about the same time, or within the period of gestation would not of itself be a bar to this suit. The most that could result from others having such intercourse with her would be to cast doubt upon the paternity of the child, but still you must determine from all the evidence in the case whether or not the defendant is the father of ^{such} child." It should be noted that the fourth instruction advised the jury that they should never give any weight or credit to the testimony of a witness believed by them to be testifying falsely. This instruction does not contain the element that the witness should be willfully testifying falsely nor does it except the fact that such witness might be corroborated by other facts in proof. It, in effect, advised the jury that no weight or credit whatever should be given to the testimony of a witness believed by them to be testifying falsely though such testimony might not be willfully given and even though such witness might be corroborated by other facts and circumstances in evidence. Our Supreme Court in Perkins v. Kinsely 204 Ill. 275 held an instruction of this nature to be erroneous.

The sixth instruction advised the jury that even though it was a fact that some other person had had sexual relations with the relatrix about the time of conception the most weight which such fact could have in the minds of the jury would be to cast doubt upon the paternity of the child. This instruction is much stronger in this regard than was the instruction held erroneous by the Appellate Court.

of the First District in the case of People v. Lamberg 160 Ill. App. 644. It seems to us this instruction invades the province of the jury to the extent that the court purports to advise the jury of the weight or effect to be given to certain testimony in the case which has been held to be erroneous in a line of decisions beginning with Herkelrath v. Stockey 63 Ill. 486.

While we are reluctant to disturb this judgment where three juries have returned the same verdict yet in view of the very unsatisfactory conditions of the proof we are of the opinion that the error committed by the court in giving the two instructions above referred to demands that the judgment be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

It is not to be denied that this judgment was based on

view of the very mass

of the opinion that

the instructions given

REVENUE DEPARTMENT

In The

APPELLATE COURT OF ILLINOIS,
Fourth district

MARCH TERM, A. D. 1925.

FRANCIS McENDREE and LOUIS
McENDREE, Partners, doing business
as McENDREE BROTHERS,

vs.

ILLINOIS CENTRAL RAILROAD
COMPANY A CORPORATION,

Appellees,

Appellant.

Appeal from

Circuit Court,

Franklin County.

238 I.A. 651

OPINION by HIGBEE, P. J.

This is an appeal from a judgment of the Circuit Court of Franklin County for \$450.00 against the Illinois Central Railroad Company, appellant, and in favor of Frances McEndree and Louis McEndree, partners doing business as McEndree Brothers, appellees.

The judgment is for injuries which it is alleged were received by three horses shipped by appellees from Pinckneyville to Benton, Illinois, over appellant's railroad. The horses were race horses which appellees had raced in the Pinckneyville fair just prior to their shipment on October 8, 1922 to Benton. They were shipped in a stock car which was part of a freight train made up in the Pinckneyville yards by a switching crew. In making up the train this particular car was moved several times. As the evidence shows it occupied four positions which means that it was coupled onto four times. It is contended by appellees that the horses were injured in this switching at Pinckneyville; that at different times when the switch engine and other cars were coupled onto this one, the jar was so violent that the horses were thrown down and were thereby injured.

Only two grounds are argued for a reversal of this judgment:

(1) That the verdict is against the weight of the evidence and (2)

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Rose Culverman Atty. for Appellant
R. E. Smith Atty. for Appellee
J. O. Smith Circuit Judge

that attorney for appellees made improper remarks in his closing argument.

Appellees were both in the car all during the switching at Pinckneyville. They described the manner in which the horses were tied in the car and testified that in the switching the horses were knocked to the floor of the car twice. Both of the appellees testified positively to the rough manner in which the car was handled in switching, and that the horses sustained their injuries in that manner. The horses were examined by a veterinarian the next day at Benton, and he also testified as to the extent of the injuries at that time. This was all the evidence for appellees in chief. Three members of the switching crew testified in behalf of appellant that the car in question was not handled roughly in the switching. Two members of the train crew which moved the train to Benton testified that there was no jar in coupling up ^{to} this car the engine which moved the train out of Pinckneyville. Other witnesses testified that the track on which these horses raced on October 6 before they were shipped on the eighth was very muddy and a veterinarian testified that all the injuries which he found on the horses save some cuts could have been sustained by them either by racing in the mud or in their stalls. Lee McEndree, a nephew of appellees testified that he helped load the horses and was in the car with appellees during the switching of the car at Pinckneyville, and that there was "no jar or smash" that he knew of during the switching. It developed on cross examination that at this time this witness was drinking to some extent and he admitted that he went to sleep about the time the train left Pinckneyville. It also appears that at a point between Pinckneyville and Benton the conductor came along and found this witness asleep with his head in the open door of the car, and that he awoke him and told him he had better move farther into the car. In rebuttal Francis McEndree testified that at the time the horses were loaded at Pinckneyville, Lee McEndree was drunk. It appears that the attention of the train crews was not called to the fact that there was any controversy about the

manner in which this stock car was handled in the switching at Pinckneyville until some weeks after it happened. Appellees testified the horses were in good condition when loaded at Pinckneyville and there is no evidence tending to show that they were not. While the track upon which they raced was muddy and the veterinarian testified that all of the injuries except the bruises might result from racing on a muddy track "or in other ways than being bumped in the car", yet there is nothing to show that the injuries were so sustained. The jury saw and heard the witnesses testify and the question whether the injuries were caused by negligence of appellees was a question of fact to be determined by them.

No complaint is made that the jury was not properly instructed, and while the evidence is close, yet we cannot say that the verdict is so contrary to the manifest weight of the evidence that it should not be allowed to stand. The language used by attorney for appellee in his closing argument of which complaint is made, is as follows: "Do you suppose that these railroad men when an investigation was made, or in taking the witness stand, would admit that there was rough handling when if they had done so in the investigation or on the witness stand they would lose their jobs". These remarks of counsel were manifestly improper and prejudicial but they were not mentioned as one of the grounds for a new trial in the written motion filed therefore, and are not referred to in the assignment of errors.

It is the well settled law of this state that if the grounds of a motion for a new trial are specified in writing all grounds not set forth in such written motion are waived. (Yarber v. Chicago & Alton Railway Co., 235 Ill. 589) . Appellant not having included in its written ^{motion} for a new trial the remarks of the attorney as one of the grounds for new trial, is in no position to raise that question on this appeal. The judgment is therefore affirmed.

AFFIRMED.

Not to be reported.

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

March Term, A. D. 1925.

4/20/25
filed Aug 5th 1925
238 I.A. 631

VIVIAN PLUNK,
Appellee,
vs.
CITY OF GRANITE CITY,
Appellant.

Appeal from
City Court,
Granite City,

OPINION by HIGBIE, P. J.

This is a suit by Vivian Plunk, appellee, against the City of Granite City to recover for injuries she claims to have received by a fall resulting from her stepping on a manhole^{or}/sewer covering in that City. Upon trial before a jury a verdict for \$3000.00 was rendered in favor of appellee. By this appeal it sought by appellant to reverse the judgment entered on that verdict after a motion for new trial was denied. The accident occurred on the 6th day of June, 1924.

The principal reason urged for a reversal of this judgment is that the notice of the injuries served upon appellant did not comply with the requirements of the Statute.

It is stated in the argument for appellant that the notice gave appellee's residence as being "on Palmer Avenue, American Gardens, near Granite City" while she testified that she "lived on Palmer Avenue in ^{East} Granite." Neither the declaration nor this notice has been abstracted. In order to know the allegations of the declaration concerning the notice or the contents of the notice itself we would be obliged to search the records. The presumption is that the judgment of the lower court is correct. It is the duty of parties bringing cases to this court for review to prepare and file complete abstracts

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Faulkner Moore atty for Appellant
H. J. Brady atty for Appellee
Hon. J. R. Sullivan, Clerk

of record in accordance with the rules and such abstracts should clearly disclose the errors relied upon for a reversal of the judgment. Since neither the declaration nor the notice appears in the abstract this court cannot now be asked to consider this alleged error. (Gibler v. City of Mattoon 167 Ill. 18; Gillman v. The People 178 Ill. 19 and Reavely v. Harris 239 Ill. 526.)

It appears from the evidence, as abstracted, that the manhole in question was located between the sidewalk and the curbing of the street. It also appears that in order to avoid mud upon certain portions of the sidewalk and street appellee left the sidewalk and stopped upon the manhole in question. It is urged that by departing from the sidewalk appellee was guilty of contributory negligence. Whether appellee in thus departing from the sidewalk was guilty of contributory negligence or in other words whether she was exercising due care and caution for her own safety at the time of the accident was a question of fact to be determined by the jury, from the evidence and its findings in favor of appellee upon this question, was justified. It is also contended that the verdict was excessive. Appellee testified that she was employed by the Elder Manufacturing Company at the time of the accident and had not since then been able to return to her work. It appears from her testimony and that of Dr. Darner that her left leg was bruised and somewhat lacerated, and that she also had bruises on her back and abdomen. The doctor testified that upon a further examination he found that she was suffering from retroversion of the womb, and that she was operated upon July 21, 1924, to relieve that condition. He further testified that this operation cost her about \$200.00; that he could not say that the fall caused the injury to the womb, but that an injury or ^a fall is one of the causes of retroversion of the womb. Whether or not this injury was caused by the fall was also ^{decided} a question of fact to be determined by the jury.

Appellee's physician testified that a fall could have been the cause of such an injury, and appellee herself testified that it was the cause thereof. We cannot under this condition of the proof hold that the finding of the jury in this respect was contrary to the manifest weight of the evidence.

No complaint is made of the court's rulings on the admissibility of the evidence or on the instructions. The judgment will be affirmed.

AFFIRMED.

Not to be reported.



In The
APPELLATE COURT OF ILLINOIS,
Fourth district.

238 I.A. 651⁶

MARCH TERM, A. D. 1925.

W. H. FARIS,

Appellee,

vs.

THE AMERICAN RAILWAY
EXPRESS COMPANY,

Appellant.

Appeal from

Circuit Court,

Bond County.

OPINION by HIGBEE, P. J.

This is an action brought by W. H. Faris, appellee, against the American Railway Express Company, appellant, to recover for injuries which it is alleged were sustained by a certain colt purchased by appellee at Mena, Arkansas, and consigned to him at Sorento, Illinois, and also for the cost of keeping the colt from the date it reached Sorento until the institution of the suit. The suit was brought for \$100.00 the value of the colt, and \$255.00 for its keep. The verdict was returned in favor of appellee for the sum of \$355.00. We have not been favored with any brief in this case in behalf of appellee. The evidence conclusively shows that the crate in which the colt was shipped was in good condition and was not broken or damaged in any way when it reached Sorento. The evidence also shows that while the openings in the crate from the body of the colt down were so small that it was difficult to make any close examination of it, yet there were witnesses who saw and commented upon a cut or injury on one of its legs after it was crated but before it was shipped. The evidence also shows^d that the animal was somewhat wild and that the consigner had considerable difficulty in crating it for shipment. It further appears that appellee refused to receive the colt and that appellant's agent arranged for him to keep it for one dollar and fifty cents a day until the matter could be adjusted. In a short time thereafter appel-

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Brown & Burnside Attys for Appellant
J. H. Allio & Robert Wright " " Appellee
Hon. G. B. Brown Circuit Judge

lee was notified that his claim could not be recognized. Upon the trial appellant submitted the following proposition of law to the court.

"The Court holds that although the colt in question was injured at the time it arrived at Sorento, and although it was injured on account of or through the negligence or misconduct of the defendant or his servants, and was turned over to the plaintiff on an agreement by the defendant that it, the defendant, would pay to the plaintiff \$1.50 a day for keeping said colt during the time an investigation was made to determine whether or not defendant was responsible for its condition. If the plaintiff made a claim against the defendant for damages so sustained by the said colt, such claim in law amounts to an acceptance by the plaintiff of said colt, or an acknowledgement by him of his ownership of said colt, and the plaintiff would not be entitled to recover for keeping said colt after the claim had been declined." This proposition stated the law applicable to the case correctly and should have been given.

There was no evidence whatever tending to show any negligence upon the part of appellant or any of its agents in the transportation of the colt. If the colt suffered the injuries in question because of its own viciousness or restlessness, appellant, in the absence of any proof of any negligence upon its part, would not be responsible. (Libro v. C. C. C. & St. L. R. Co. 202 Ill. App. 418, Ill. Central R. R. Co. v. Brelsford 13 Ill. App. 251). In the absence of proof of any negligence whatsoever

upon the part of appellant the mere fact that the colt was injured when it arrived at Sorento is not sufficient proof upon which to hold appellant liable, in view of the fact that there was proof tending to show that the colt was injured before it was delivered to appellant for shipment.

For the reasons given above the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

MARCH TERM, A. D. 1925.

238 I.A. 652

CHARLES FISHER,
Appellant.
vs.
HAZEL FISHER,
Appellee.

Appeal from
Circuit Court,
Madison County.

OPINION by HIGBEE, P. J.

After the opinion was handed down in this case appellant filed a petition for a rehearing. In his petition appellant represented that this court had twice reversed a verdict and decree in favor of appellee upon the ground that the evidence did not sustain the decree and asked that the court grant a rehearing and make a final decision of the right of appellee to a divorce on her cross bill, by reversing the decree granting her a divorce and remanding the cause with directions to dismiss appellee's cross bill. He also stated therein that since the opinion was filed in this case, appellant had filed his motion, admitted of record, to the effect that he will be unable to prove the charge of desertion alleged in the original bill of complaint with any other or further proof than appears in this record. In order that the court might consider the question whether or not this litigation may be ended by the decision of this court, a petition for a re-hearing was allowed. In her reply to this petition appellee re-asserts that the evidence sustains a decree in her favor on the ground of extreme and repeated cruelty, but further contends the evidence does not tend to support appellant's charge of desertion in his original bill and that if the decree is reversed with directions to dismiss appellee's cross-bill the trial court should also be directed to dismiss appellant's original bill

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W. Burton atty for appellant
Ellis & Dunham " " appellee
Hon. J. F. Sullivan Circuit Judge

of complaint.

Upon a re-consideration of this case and a very careful examination of the record we are of the opinion that there is no evidence in the record tending to support appellee's charge of extreme and repeated cruelty as that term has been defined in *Trenchard v. Trenchard*, 245 Ill. 313 and other decisions of the courts of this state. As stated in the opinion of this court the evidence shows that appellant was guilty of using profane language toward appellee without any considerable provocation. Such conduct on the part of appellant may have been reasonable cause for appellee declining to live with him, without being sufficient statutory grounds for divorce. (*Schoen v. Schoen*, 48 Ill. App. 382; *Farnham v. Farnham*, 73 Ill. 497; *Albee v. Albee*, 141 Ill. 550.)

On the other hand we are of opinion that the evidence fails to show the facts which would entitle appellant to a decree on his original bill and as he states that he will be unable to produce other or further proof than that which appears in this record in support of his charges, it follows that he will never be able to sustain a decree in his favor, under the circumstances, as above stated; we feel that justice requires us to put an end to this litigation. The decree is therefore reversed and the cause remanded with directions to the trial court to dismiss appellee's cross-bill and appellant's original bill.

Reversed and Remanded with Directions.

Not to be reported.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

MARCH TERM, A. D. 1925.

238 I.A. 652
Filed 5/11/25

FRED W. KUNZ,
Appellee.

vs.

CITY OF DU QUOIN,
Appellant.

APPEAL FROM CIRCUIT COURT

OF

PERRY

COUNTY.

~~Barry J.~~ That part of Chestnut street between Poplar and Franklin streets is a clay dirt road. Appellant's street commissioner says that in the latter part of April 1923, "It was pretty rough - pretty wholey, where cars would get stuck, spin the wheels and dig holes". He says he then used the grader on it, pulling the dirt from the ditches to the center; that he leveled it filling the holes with loose dirt. Other witnesses say the street had been rough and full of chuck holes, some of which were two or three feet deep, for a long time. The official weather observer testified that 5.90 inches of rain fell in Du Quoin between May 2nd and May 16th, 1923. There is also evidence that it rained on the night of May 18th and that the next morning the street was very muddy and the holes were full of water.

Appellee owned a team and transfer wagon, which was operated by a man employed for that purpose. He frequently accompanied the driver and assisted him in handling the freight. On the morning of May 19th, 1923, they had hauled a load of iron

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*H. E. Himmel atty for Appellant
M. C. Cook & L. H. Cransty for Appellee
Hon Louis B. ... Circuit Judge*

pipe for a customer and when returning on Chestnut street in the block above described one of the front wheels of the wagon went into a hole about two feet deep and a foot and a half wide. Appellee was sitting on an improvised seat in the wagon, back of the driver's seat and was thrown with such force that his hip was broken and he was otherwise bruised and injured. He sued and recovered a verdict and judgment for \$2,000.00.

Appellant argues that the notice of the injury does not meet the requirements of the statute and that there was no proper proof that it was served upon the City Clerk and City Attorney. When the notice was offered in evidence appellant made no objection thereto. It now insists that these questions were properly preserved by its motion for a directed verdict both at the close of appellee's evidence and at the close of all the evidence. Appellant filed a written motion for ^a a new trial in which certain grounds therefor were specified but none of them, in any way, refer to the court's refusal to direct a verdict. Alleged errors which are not among the grounds specified in the written motion for a new trial are waived, *Yarber vs C. & A. Ry. Co.* 235 Ill. 589; *People vs Cion*, 293 Ill. 321. But if those questions had been properly preserved we could not agree with appellant's contentions. The notice was in substantial compliance with the provisions of the statute and attached thereto were the receipt of the City Clerk and City Attorney.

The only instructions given on behalf of appellee was to the effect that it was appellant's duty to exercise reasonable care to keep its streets in reasonably good and sufficient repair; that if ^{it} failed to perform its duty in that regard and appellee was injured by reason thereof while he was in the exercise of due care for his own safety he was entitled to recover.

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It is insisted that as the instructions omitted any reference to the question of notice on the part of appellant the court committed such an error as could not be cured by other instructions. Where there was evidence that the defect in the sidewalk which caused the plaintiff's injury had existed for a sufficient time prior to the injury that the city, if it had used ordinary diligence, might have known of the defect, the court held that such an instruction as the one under consideration was not calculated to mislead the jury, *City of Chicago vs. Dalle*, 115 Ill. 386-390. Under the facts in the case at bar we do not think the jury could have been misled by this instruction.

But if the failure of the instruction to require the jury to find that appellant had notice, actual or constructive, in time to have repaired the street before the accident, was a defect it was one that could be cured by other instructions, *Village of Sheridan vs. Hibbard*, 19 App. 421; *City of Chicago vs. Dalle*, 115 Ill. 386-390; *Village of Mansfield vs. Moore*, 124 Ill. 133. To the same effect is *City of Rockford vs. Hildebrand*, 61 Ill. 155. The record discloses that in three instructions given on behalf of appellant the court instructed the jury that they must find in favor of appellant unless appellee had proven by a preponderance of the evidence that the City had actual or constructive notice of the defective condition of the street.

It is argued the instruction was erroneous in requiring appellant to use reasonable care to keep and maintain its street in reasonably good and sufficient repair. That contention is fully answered by *Village of Mansfield vs. Moore*, 124 Ill. 133 and *City of Gibson vs. Murray*, 216 Ill. 589. Under the law and the evidence the court did not commit reversible error

in the giving of appellee's instruction.

Appellant pleaded a set off to the effect that for more than 30 days prior to the accident there was a city ordinance in full force and effect which provided that all persons hauling upon the streets and alleys of the City for hire should pay a teamster's license or tax and for a failure to take out a license he should be fined not less than \$5.00 nor more than \$200.00 for each offense; that appellee did not take out a license and by reason thereof was a trespasser upon the streets at the time of the accident and was indebted to appellant in the sum of \$3800.00 for fines. A demurrer was sustained to those pleas. The court did not err in its ruling in that regard.

Appellant contends that the court erred in allowing one witness to testify that the street in the block in question had been full of chuck-holes for six years. The witness described it as a continuing condition for that period. Of course if the witness had simply stated its condition six years before the accident without showing that he knew the condition had continued the objection would be more serious. At any rate, we are not prepared to hold that the admission of that evidence was reversible error under the circumstances of this case. Some other minor errors have been argued and have been fully considered, but we find nothing that would warrant us in reversing the judgment. For that reason it is affirmed.

AFFIRMED.

not to be reported.

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APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1925.

238 I.A. 652

ROBERT HAWKINS,

Appellee.

vs.

C. L. Gray, et al,

Appellant.

Appeal from

Circuit Court,

Franklin County.

OPINION by BARRY, J.

Appellants employed appellee to paint their factory building, inside and outside, which was 100 feet wide and 325 feet long. Appellee had a spraying machine which could be and was used in painting a portion of the building. Appellee testified that he agreed to furnish the machine and two men to operate it at the rate of \$25.00 per day, each of the men to receive \$10.00 per day and \$5.00 per day for the use of the machine; that ~~HAWKINS~~ he was to receive \$1.25 per hour for each additional man who worked on the job. There was no limit or estimate as to the time it would take to do the painting. Appellants did not testify so we must assume that the contract was as stated by appellee.

Appellants employed a man to keep track of the time appellee and his men were engaged in the work and he made a record thereof upon which appellee was paid at the end of each week. That record shows that the work was in progress about 5 weeks and that from 3 to 7 men were employed by appellee on the work each week with the exception of the first full week when he had but two. The record so kept by appellants time keeper shows that there was due appellee on account of the men \$1172.50 and that he was paid \$989.98 leaving a balance of \$182.52. In addition to that appellants were to pay \$5.00 per day for

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Moses Culverman atty. for Appellant
H. F. Knox " " Appellee
Hon. J. C. Bagleton, Circuit Judge

the use of the machine and about which there is no dispute. The evidence shows beyond question that the machine was used on the job as much as 19 full days, amounting to \$95.00. The jury found in favor of appellee and assessed his damages at \$277.52, and judgment was rendered on the verdict.

Appellants contend that appellee has already been greatly overpaid under his contract; that the verdict is contrary to the law and the evidence and that the judgment should be reversed with a finding of facts. The basis of their contention is that appellee was to do the work with the machine and two men and if it had been done in that way the entire work would not have cost more than \$900.00 to \$975.00. That the machine was out of order much of the time and that by reason thereof more men were employed which made the work more expensive. The undisputed evidence is that appellants sent one extra man to appellee with instructions to put him to work on the painting. The record kept by their timekeeper informed them that more than two men were at work nearly all of the time.

Appellants did not/^{ask} a peremptory instruction at the close of appellee's evidence, or at the close of all the evidence, but conceded that the evidence presented a question of fact for the jury to determine. In the state of record we would not be warranted in setting aside the verdict. The judgment is affirmed.

AFFIRMED.

Not to be reported.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1925.

WABASH VALLEY MOTOR CO.,

Appellant.

vs.

H. V. PIPP, et al,

Appellees.

Appeal from

Circuit Court,

Wabash County.

OPINION by BARRY, J.

Appellant sold appellees an automobile for which they paid \$535.00, in cash and gave their judgment note for \$600.00. After maturity of the note appellant procured a judgment by confession which was opened with leave to plead. Appellees then filed the general issue and two special pleas. Their first special plea was to the effect that there was a partial failure of consideration due to the fact that the car was warranted and that there was a breach of the warranty. The second special plea averred a total failure of consideration for the same reasons. Appellant replied to the first special plea by averring that the car was in good mechanical condition when it was sold and delivered to appellees. The replication to the second special plea contained that same averment and denied that the car was warranted. The trial resulted in a verdict and judgment for \$115.00.

The issues raised by the second special plea were abandoned as no evidence was offered tending to prove a total failure of consideration. The replication to the first special plea did not deny that appellant warranted the car. For that reason we must assume that there was a warranty, *Thoenig vs. Hawkins*, 291 Ill. 454-457.

The evidence as to whether there was a breach of warranty and as to the value of the car in the condition it was at the time of

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Gaughan, Tolb & McLaughlin Attys for Appellant
Tolb & White Attys for Appellee
Hon. J. C. Engleton Circuit Judge

filed Aug. 5th 1925
 238 I.A. 652⁴

he sale was conflicting and presented questions of fact to be determined by the jury. In the state of the proof we are not warranted in holding that the verdict is so manifestly against the weight of the evidence that it should not be allowed to stand.

We have carefully considered the alleged errors in the rulings on the evidence and in refusing certain instructions requested by appellant and in our opinion the court did not commit reversible error in any of these respects. The eight instructions given on behalf of appellant stated the law as favorably for it as it was entitled to and no complaint is made of the instructions given for appellees. There is no reversible error and the judgment is affirmed.

AFFIRMED.

ot to be reported.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1925.

D. T. WHITLOCK,

Appellee.

vs.

JULIUS SCHWARTZ,

Appellant.

Appeal from

City Court,

East St. Louis.

238 I.A. 652

OPINION by BARRY, J.

The parties entered into a written contract by the terms of which appellee agreed to furnish the necessary labor for the construction of a residence, a garage and two cesspools for the sum of \$1100.00. Appellant was to provide all materials and appellee was to do the work according to certain plans and specifications. Appellant was to pay appellee at the end of each week the sum of seventy-five cents per hour for the work done by him together with the actual wages earned by men employed to assist in the work. Appellee agreed to keep an accurate account of such wages and the weekly payments were to continue until appellee had received \$550.00. The balance of the contract price was to be withheld until the work was completed. Payments were made from time to time until appellant had paid \$1298.08 or \$198.08 more than the contract price.

The contract made no provision for changes or alterations desired by appellant or for additional compensation for extra work occasioned thereby. Appellee sued to recover for certain extra work designated in his bill of particulars amounting to \$158.92. The trial resulted in a verdict and judgment therefore.

It is quite evident that changes were made in the original plans and specifications at appellant's request, which required extra

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Reasley & Gully Atty. for Appellant
 Grace & L. J. Smith " " Appellee
 Wm. D. Sullivan City Ind.

work. This is indicated by the fact that he paid \$198.08 more than the contract price without objection. Upon the trial appellee was about to detail all of the changes that necessitated extra work and to explain that a portion/^{of} the same had been paid but appellant insisted that he should confine his testimony to the items in his bill of particulars and the objection was sustained. He then testified, without objection, that all of the items sued for were for extra work occasioned by changes made at the request of appellant. The latter did not deny that such changes were made at his suggestion.

Appellee's testimony in chief fully supported his claim. The cross-examination was calculated to leave the impression that perhaps his testimony was in conflict with his books in which he had kept a record of the work and the time he and his men were engaged in doing it. In rebuttal appellee offered the books in evidence and appellant does not now argue that the court erred in its ruling in that regard. On the contrary, he insists that appellee failed to prove his claim and attempts to show that such is the case by calling attention to various alleged discrepancies between appellee's testimony and the evidence disclosed by his books. The abstract of the record does not give us any information as to what appears upon those books. The abstract must be sufficient to present every error relied upon as the court will not search the record for errors upon which to reverse a judgment, *People v. Paul*, 167 App. 557; *People vs. Armour*, 307 Ill. 234.

The Court instructed the jury at appellant's request that appellee was suing on his supposed claim for extra work and that appellant was contending that the items claimed were included in and a part of the original contract; that appellee must prove by a preponderance of the evidence that the items sued for were for extra work not included in the original contract and if he failed to make such proof the jury should find in favor of appellant. From that instruction it is quite evident that at the close of all the evidence appellant was of the opinion that if the work had been performed the only issue was as

to whether it was extra work or was included in the original contract.

Appellant did not testify that he requested no changes or that none were made, nor did he explain the circumstances of having voluntarily paid more than the contract price. He says that he and appellee figured the balance due on April 12, 1924 to be \$13.28; that he paid it and appellee signed a receipt on the back of the contract reciting that said sum covered full payment of the contract. Appellant does not claim that the question of extra work was discussed at that time and says that appellee made no claim for extra work at any time during the progress of the work. The evidence presented questions of fact and it was the peculiar province of the jury to determine the same. The Court did not err in refusing to direct a verdict.

It is argued that the work was not done in a good workman-like manner. That was also a question for the jury. It is further insisted that appellee failed to prove his case by a preponderance of the evidence. We would not be warranted in reversing on that ground, unless we could say that the verdict is manifestly against the weight of the evidence. This we cannot do.

The contract contained a clause to the effect that in case of any disagreement or dispute as to the manner of doing any of the work, or as to the manner in which any work may have been done before any such disagreement or dispute arose, the parties should submit such disputed questions of fact to the Building Commissioner of East St. Louis for his determination, and his decision should be final and binding. Appellant argues that said provision was not complied with and for that reason his peremptory instruction should have been given. It is sufficient to say that so far as the evidence shows there was no disagreement or dispute in either of the regards aforesaid until the case was upon trial in the City Court and there is nothing to indicate that this particular contention was ever brought to the attention of that Court. No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
MARCH TERM, A. D. .925.

5th 1925
238 I.A. 653

K.D.HORRALL HARDWARE
COMPANY,
Appellee.
vs.
VAN CAMP HARDWARE AND
IRON COMPANY, INC.,
Appellant.

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT.

OPINION BY BOGGS, J.

Appellant, being engaged in the wholesale hardware business in Indianapolis, Indiana, sold merchandise from time to time to appellee, a retail dealer in Olney, Illinois. On January 1, 1923, appellee was indebted to appellant, as appellee claims, in the amount of \$1,284.02, and as appellant claims, in the amount of \$1,396.39. The amount of this indebtedness was reduced somewhat, and thereafter a settlement was made between said parties, in and by which ^{said} settlement appellee was to pay appellant \$1,050.00 in weekly payments of \$50.00 each, the first payment to be made on July 21, 1923, and the last one on December 8, 1923. As a part of said transaction twenty-one checks for \$50.00 each, falling due one each week beginning on the 21st day of July, 1923, were delivered to appellant by appellee.

Some time in the latter part of September of that year,

J.C. Ritter atty for Appellant
John Lynch " " Appellee
Hon. C. H. Miller Circuit Judge

appellee notified appellant that it was about to sell its business. Thereupon appellant placed said checks remaining unpaid in the hands of a collection agency for collection. In October, 1923, appellant was delivered a check for \$750.00, being the amount claimed by said collection agent to be owing from appellee. Appellee insists that it overpaid appellant \$50.00, it being the contention of appellee that there were only fourteen of the checks given by it, remaining unpaid at the time said payment of \$750.00 was made.

There is a conflict in the evidence as to the number of checks that were turned over to appellee at the time said \$750.00 was paid, it being the contention of appellants that they delivered to appellee fifteen checks at that time. The evidence tends to show that the checks were not always surrendered when paid, so that, even though fifteen checks were delivered at that time, there may have been one or more of them that had been paid prior thereto.

In corroboration of appellee's contention that there was only \$700.00 due at ^{the} time, two letters were offered in evidence, written by appellant, one of which specifically stated that there was \$700.00 ^{due,} and set out the matter of the claim in some detail. The second letter was a follow-up letter, written some week after the other, which referred to the former letter as having stated the amount that was then due from appellee.

A jury being waived, said cause was tried by the court and a finding was made in favor of appellee for the sum of \$50.00, and judgment was rendered thereon for said amount. Without going into a discussion of the evidence in detail, we are satisfied that the finding of the trial court is not against the manifest weight of the evidence. This being true, we would not be warranted in reversing the judgment. Certain other document-

ary evidence in the record, in addition to the two letters written by appellant, tended to corroborate appellee's contention as to the amount due. If the amount as given in appellant's letter was correct, appellee overpaid appellant \$50.00 and was entitled to recover therefor.

Finding no reversible error in the record, the judgment of the trial court will be . affirmed.

JUDGMENT AFFIRMED.

not to be reported.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARTH TERM, A. D. 1925.

238 I.A. 653

LOUIS KALISH, Trustee,
Appellant,
vs.JOHN KOVACIC and KATIE KOVACIC,
Appellees.
-----Appeal from the
Circuit Court of
St. Clair County

OPINION by BOGGS, J.

On October 11th, 1921, appellees executed their promissory note payable to appellant for \$1,000.00, due one year after date, together with a mortgage securing the same. Appellees failed to pay said note, and appellant filed a bill to foreclose the mortgage, in the Circuit Court of St. Clair County.

Appellees filed a special plea to said bill, setting forth that said note and mortgage were procured from them through fraud and circumvention by one Mike Kalish, a brother of appellant. They also filed a joint answer, setting forth that they were induced to sign said note and mortgage by "misrepresentation, fraud and deceit", that they did not owe appellant any sum of money whatever on account of said promissory note or otherwise, and that in equity the mortgage purporting to secure said note given by them as aforesaid, was not a lien on their premises, and prayed that said answer be taken for a cross-bill, and that said mortgage be decreed a cloud on their title and removed as such.

A replication being filed to said answer, said cause was referred to J. B. McGlynn as master in chancery, to take the evidence and to report the same to the court, with his conclusions of law and fact thereon. The whole or the greater part of the evidence was taken by said master, but the same not having been reported,

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A. G. Baker Atty for Appellant
M. J. Joyce " " Appellee
Hon. G. A. Crow Circuit Judge

said cause was by agreement of parties referred to P. K. Johnson, ^{said} his successor in/office. The evidence taken was reported by Johnson as master, together with his conclusions of law and fact thereon, and was to the effect that the complainant had failed to sustain the averments of his bill; that said note and mortgage were given without consideration, and that a decree should be entered dismissing said bill for want of equity.

Objections were filed to said report by appellant, which objections were overruled by the master and were ordered to stand as exceptions. The court heard said cause and overruled the exceptions to the master's report and entered a decree confirming the same and dismissing said bill for want of equity. To reverse said decree, this appeal is prosecuted.

The principal ground relied on by appellant for a reversal of said decree is that the findings of the master and of the chancellor are against the manifest weight of the evidence.

The evidence on the part of appellant is to the effect that there were certain informations or indictments against appellee John Kovacic, charging a violation of the liquor laws, and certain informations against Katie Kovacic, charging her with resisting an officer; that appellees applied to one E. V. Hissrich, secretary of a building and loan association, for a loan of \$1,000.00; that said Hissrich informed them that it would be necessary for him to investigate the title, and that it would take some two or three days to make such investigation; that appellees were not willing to wait, and thereupon applied to appellant for such loan, and that he loaned them \$1,000.00, taking the note and mortgage to himself as above set forth; that he personally paid to appellee Katie Kovacic, who held the title to the mortgaged real estate, the sum of \$1,000.00 in \$20.00 bills; that she then paid him back \$60.00 for the first years interest; that appellant transacted said business with appellees, and that his brother Mike Kalish had nothing whatever to do with the making of said loan.

Hissrich, the secretary of said building and loan association, who was placed on the stand by appellant, testified on cross examination that his recollection was that Mike Kalish had attended to the mortgage transaction, and that so far as he remembered, appellant was not even there. He further testified that it was his recollection that he delivered the papers to Mike Kalish. He also testified that he himself sent the mortgage to the Recorder's office for recording, and that it was his recollection that after the same was returned, he delivered it to Mike Kalish. This witness did not corroborate appellant's theory with reference to how the transaction was consummated.

On the other hand, the evidence on behalf of appellee is to the effect that Mike Kalish, brother of appellant, came to them and told them that they were in trouble and that they had better make a loan on their property or the same would be taken from them, and they would lose it; that they ascertained that it would be necessary for them to give bond to the sheriff in the aggregate sum of \$4,800.00, \$2,000.00 for appellee John Kovacic and \$2,800.00 for Katia Kovacic; that Mike Kalish went on the bond with them; that the day prior to the execution of said note and mortgage, Mike Kalish took appellee John Kovacic, with a third party, to Belleville, where he left him in the automobile, and after calling on a party or parties, came back and told him that he would have to pay \$600.00 or lose his property; that there was a charge against him for selling whisky; that appellee protested that he was not guilty of selling whisky and that he would stand trial; that Mike Kalish then said, "No, don't do it, because they send you up and take your property away." That on the next day the note and mortgage in question were given. Appellees further testified that all they received out of the \$1,000.00 was \$266.00, which Mike Kalish paid to them. They also testified that some four or five days afterwards, he gave them a receipt, which is as follows:

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and mortgage, Mike Kayside took possession of the
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Mike Kayside on said, "No, don't do it, because

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in question were given. Applied for their release

and out of the \$1,000.00 was paid.

They also mentioned that when they got out of

"10/29/1931.

"I received Six Hundred from Kathey Kevacec and \$600.00 guarantee her that she dont haf to pay any more for the gorges they had brod against her.

\$734.00

Seventh hundred and thirty four \$

(Signed) Mike Kalish

215 Exchange Ave."

Appellees further testified that they never were brought to trial, never were required to enter a plea, and that if there were any proceedings against them, they were dropped.

In rebuttal of the testimony offered by appellees, appellant offered evidence to the effect that appellees had promised Mike Kalish that they would give him \$400.00 for going on their bond; that they asked him to procure them a lawyer and that he did so; that appellees gave him \$200.00, which he gave to the attorney, whose name was L. V. Walcott. Walcott corroborated appellant to the effect that he had been employed by appellees, and that as their attorney he was instrumental in procuring the state's attorney to drop the informations which were pending against appellaoes in the county court of said county, and that he was paid \$200.00 for his services.

Counsel for appellant undertakes to account for the amount of said loan of \$1,000.00 in the following manner; \$400.00 to Mike Kalish for going on bonds for appellees; \$60.00 advance interest paid to appellant; \$266.00 paid in cash to appellees; \$200.00 to Walcott for attorney's fees, and suggests there was probably something paid to Mike Kalish for procuring the loan, and that there would be expenses of recording, acknowledgement fees, etc.

Appellees specifically deny that Walcott was ever employed by them personally or that Mike Kalish was authorized to employ him; that they never paid Walcott directly, nor through Mike Kalish, \$200.00 or any other sum; that they never paid Mike Kalish \$400.00 or

any other sum for going on their bonds; in other words, appellees testified that all they received upon giving said note and mortgage was said sum of \$266.00.

The master found that appellant had failed to sustain his bill to the effect that he had personally paid to appellees \$1,000.00 upon the giving of said note and mortgage, or that any consideration passed from appellant to appellees; that therefore, as Mike Kalish was not a party to said proceeding, there could be no foreclosure for any amount on said note and mortgage.

Without going into a further discussion of the evidence, we are of the opinion and hold that it supports the findings of the master and of the chancellor to the effect that appellant had failed to sustain the allegations of his bill. The chancellor therefore did not err in dismissing said bill for want of equity, and this without reference to whether or not Mike Kalish practiced a fraud on appellees. Where a chancellor follows the findings of the master on the facts, a reviewing court would not be inclined to disturb the same, unless said findings are clearly against the weight of the evidence. (Smith v. Thomas Elevator Co., 278 Ill. 328-332; Klekamp v. Klekamp, 275 Ill. 98; Gillespie v. Patrick, 146 App. 290-296; Reese v. Reese, 198 App. 298; Dowland v. Staley, 201 App. 8; Auto Parts Co. v. Silberstein, 211 App. 436.)

The law further is that it is essential to the validity of a mortgage and to the right to foreclose the same that it should be supported by a valid consideration. (Bacon v. German American Bank, 191 Ill. 209; Rue v. Dale, 107 Ill. 275; Scott v. McGloughlin, 132 Ill. 33; Kratzmeyer, et al, v. Weissman, opinion filed in this court at October term, 1924.) It therefore follows that if appellant paid nothing to appellees or for them on the giving of said note and

mortgage, then there was no consideration therefore, and this would be a valid defense against the foreclosure of said mortgage.

As the record now stands, whatever right, if any, Mike Kalish may have against appellees for moneys paid to or for them, must be urged in a court of law.

Finding no reversible error in the record, the judgment and decree of the trial court will be affirmed.

Decree Affirmed.

Not to be reported.

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

MARCH TERM, A. D. 1925.

WILLIAM ROCHE,

Defendant in Error,
vs.

CATHERINE GROSSHEIM,

Plaintiff in Error,
H. BRUCE FLEMING, ETHEL M. JOHNSON,
and HERSCHEL C. JOHNSON, her husband,
and L. E. KEMPER,
Defendants in Error.

Writ of Error
to the
City Court of
East St. Louis,
Illinois.

238 I.A. 653³

OPINION by BOGGS, J.

On April 21st, 1920, defendant in error H. Bruce Fleming, being indebted to Henry T. Renshaw, trustee, in the sum of \$3,000.00, executed and delivered to him his promissory note of that date, due in three years, bearing interest at 6% per annum, and secured the same by a mortgage on certain real estate situated in the city of East St. Louis, which said mortgage was duly acknowledged and recorded in the recorders office of St. Clair County. On June 22nd, 1920, Fleming conveyed said premises to defendant in error Ethel M. Johnson, subject to said mortgage of \$3,000.00, for a named consideration of \$5,500.00. On the same day Mrs. Johnson and her husband executed and delivered their promissory note for \$1,700.00, due three years after date, secured by mortgage on said premises, to Renshaw as trustee; which said mortgage was duly acknowledged and thereafter, on the 23rd day of June 1920, was filed for record in the recorders office of said county.

On or about June 22nd, 1920, plaintiff in error Catherine Grossheim purchased from Renshaw said \$1,700.00 note and mortgage. Thereafter, on September 13th, 1920, Renshaw executed a release of said \$3,000.00 mortgage, which said release was filed for record on

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*as G. M. Hale & B. M. Hale atty for Plff.
M. V. Joyce atty for Defendant.
Hon. Silas Cook City Judge*

September 16th, 1920. At the time of the execution of said release, Renshaw did not surrender to Fleming, nor to anyone, said \$3,000.00 note or the mortgage securing the same. On November 16th, 1921, Renshaw executed a release of said mortgage of \$1,700.00, and the same was filed for record November 18th, 1921. On November 16th, 1921, Mrs. Johnson and her husband executed and delivered to Renshaw, trustee, their promissory note of that date, due in three years, for \$2,000.00, and to secure the same, executed a mortgage of that date on the premises here involved, to Renshaw, trustee; which mortgage was duly acknowledged and filed for record. On November 22nd, 1921, defendant in error Kemper purchased from Renshaw said \$2,000.00 note and mortgage. On February 24th, 1922, defendant in error Roche purchased from Renshaw said \$3,000.00 note and mortgage, and is now the holder of the same.

Thereafter, on December 29th, 1922, Roche filed a bill in the city court of East St. Louis, setting up the purchase of said mortgage and its non-payment, and praying a foreclosure of the same. To said bill plaintiff in error Catherine Grossheim and the other parties were made defendants. In said bill it was averred, among other things, that the release of said \$3,000.00 mortgage held by Roche was executed after defendant in error Roche had become the legal and equitable owner thereof, and charged that the execution of said release by Renshaw was fraudulent and void as against Roche. Said bill further charged that said note and mortgage for \$1,700.00 was subsequent to and inferior to the lien held by Roche under said \$3,000.00 mortgage, and charged that said \$3,000.00 mortgage was a superior lien to the \$2,000.00 mortgage held by defendant in error Kemper.

Kemper filed an answer to said bill, denying that said \$3,000.00 mortgage was superior to his mortgage, and charging that said mortgage for \$2,000.00 held by him was a first lien on said premises by virtue of the fact that the records disclosed that said \$3,000.00 mortgage and said \$1,700.00 mortgage had both been released

prior to his purchase of said \$2,000.00 mortgage, and that he had no knowledge that the same had not been fully paid and satisfied, and that he purchased said mortgage in good faith, relying upon the record showing the release of said prior mortgages.

The defendants in error Ethel M. Johnson and Herschel C. Johnson, her husband, filed a joint answer to said bill, in which they averred that they had fully paid to Renshaw said note of \$3,000.00 at the time the release of said mortgage was filed for record by Renshaw, and that Renshaw had failed to surrender to them said note and mortgage.

An answer was filed by Catherine Grossheim, averring that she purchased for a valuable consideration said note and mortgage of \$1,700.00 from Renshaw, shortly after June 22nd, 1920, the date of the same, and that the release of said mortgage hereinabove mentioned, executed by Renshaw, was fraudulent and void as to her. She further averred in said answer that said mortgage held by her is a prior lien to said \$3,000.00 mortgage held by Roche.

Said cause being referred to a special master, the evidence was taken and reported to the court together with the special master's conclusions of law and fact thereon. Among other things, said special master found that said mortgage of \$2,000.00 held by Kemper was a prior lien on said premises. This finding is acquiesced in by all of the parties to said proceeding. He further found that the mortgage for \$3,000.00 held by Roche was a valid and subsisting lien of record at the time Catherine Grossheim purchased said note and mortgage for \$1,700.00, and that therefore said \$3,000.00 mortgage was a prior lien to said mortgage of \$1,700.00 so held by plaintiff in error.

After the filing of the report by said special master, leave was granted plaintiff in error to file a cross bill, in and by which said cross bill plaintiff in error, in addition to the allegations in her said answer, charged that the note of \$3,000.00 held by Roche had been paid in full by the Johnsons, and that the mortgage securing the same had been properly released by Renshaw. She further alleged in

said cross bill that at the time she purchased said note and mortgage of \$1,700.00, Renshaw represented to her that the same was a first lien on said premises, and that he, Renshaw, would furnish to her a certificate of title to that effect; that thereafter, on September 16th, 1920, Renshaw did so furnish said certificate of title. To said cross bill the other parties to said proceeding filed their respective answers. The answer of Roche denied the material allegations of the cross bill, and averred that the mortgage of \$3,000.00 held by Roche was a prior lien to the mortgage held by plaintiff in error.

Said cause was/^{re-}referred to said special master, and additional evidence was taken on the part of Catherine Grossheim and the Johnsons. Said special master, however, adhered to his former report, and overruled the objections filed thereto by plaintiff in error and certain of the other parties hereto. It was ordered by the court that said objections stand as exceptions. On the hearing of the exceptions to the report of said special master, the court overruled said exceptions and entered a decree in conformity with the findings of the special master. To reverse said decree, Catherine Grossheim prosecutes this writ of error.

The evidence in the record clearly discloses that at the time William Roche purchased said note and mortgage for \$3,000.00, the same had been released of record. Roche purchased said mortgage in February, 1922, whereas Renshaw had released the same of record in September, 1920, almost a year and a half before it came into the possession of Roche. The evidence further discloses that at the time said note and mortgage for \$2,000.00 was executed by the Johnsons, they had made payments to Renshaw, and Renshaw had stated in effect that the giving of said \$2,000.00 mortgage and the payments made by the Johnsons satisfied said \$3,000.00 mortgage, and that he, Renshaw, would cancel and surrender to them said note and mortgage for \$3,000.00 and would release the same of record. This being true, and said \$3,000.00 mortgage having been released of record at the time Roche

purchased the same, it clearly rendered his mortgage, if a lien on said premises at all, inferior and subsequent to the mortgage held by plaintiff in error. Payment to the legal holder of a note secured by a mortgage, before maturity, while not a defense to an action on the note by a subsequent innocent holder before maturity, is a good defense to an action to foreclose the mortgage securing the same. (Connor v. McClelland, 110 Ill. 542; Deuhler v. McCormick, 169 Ill. 269.) The law further is that the assignee of a note secured by a mortgage takes it subject to all equities and defenses existing against it in the hands of the assignor, and said assignee can acquire no better right and occupy no better position in reference thereto than the mortgagee. (Smith v. Niemann, 216 App. 179; Ocon v. Kaenes, 222 App. 45-47; Napieralski v. Simon, 198 Ill. 384-387; Bartholf v. Bensley, 234 Ill. 336; King v. Harpster, 306 Ill. 202-209.)

There was no attempt on the part of Roche to dispute the evidence offered by plaintiff in error and the Johnsons to the effect that the Johnsons had, by the giving of the \$2,000.00 note held by Kemper, and the other payments made by the Johnsons, satisfied said \$3,000.00 note held by Roche, at a time when it was still in the possession of Renshaw, the payee therein. While the testimony does not show that the specific amounts paid to Renshaw, with the \$2,000.00 note, aggregated the amount of the principal of the \$3,000.00 note together with the accrued interest, the evidence does show that Renshaw stated that when the \$2,000.00 note was executed by the Johnsons, that he would cancel the \$3,000.00 note and mortgage and release the same of record, and that any additional credits that the Johnsons might be entitled to, he would give them on the other note; in other words, indicating that the amount paid was sufficient to satisfy the \$3,000.00 note and possibly an amount in addition thereto.

In the brief and argument of counsel for plaintiff in

error, and in the brief and argument of counsel for defendant in error Roche, it is stated that the real question in the case is with reference to the priority of the mortgages held by said parties respectively. We therefore hold that the mortgage held by plaintiff in error is a prior lien to the mortgage held by Roche, and that the court erred in not so adjudging in its decree.

For the reasons above set forth, the decree of the trial court will be reversed and the cause will be remanded for further proceedings not inconsistent with our holding herein.

Reversed and Remanded.

Not to be reported.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1925.

238 I.A. 653⁴

DOROTHY SCHLUETER, by ARTHUR SCHLUETER,
Her Father and Next Friend,
Plaintiff in Error,

vs.

BELLEVILLE STOVE AND RANGE COMPANY,
Defendant in Error.

Error to

Circuit Court,

St. Clair County.

OPINION by BOGGS, J.

About four o'clock on the afternoon of October 19, 1923, one Arthur Bingheim, employed as a truck driver by defendant in error, hereinafter called defendant, was driving an empty truck of about 3,500. pounds capacity, eastward along Union Avenue in the city of Belleville. Union Avenue is a paved street running east and west through the residential district of said city, and is about twenty-five feet wide between curbs. Seventh street runs into Union Avenue but does not cross it. About a block west of Seventh Street, Arthur Minor and Roy Rookwell, two schoolboys of about the age of sixteen years, boarded said truck with Bingheim's permission, to be carried to their homes.

Near the point where Seventh Street intersects Union Avenue, a horse and surrey or team and wagon (the witnesses differ as to which) was standing near the south curb, facing eastward. As Bingheim was nearing this vehicle, plaintiff in error, hereinafter called plaintiff then of the age of about five years and two months, and another little girl, were approaching from the west along the south sidewalk of Union Avenue. About the time Bingheim turned to pass the horse and wagon or team and wagon, one of the little girls tagged the other and they both ran into the street, passing just to the east, or in front of said horse or team of horses. Bingheim halted at the children.

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*K. Johnson & E. W. Kreitzer Attys for Ptf.
Farrar & King Attys for Defendant
Hon. G. L. Brown Circuit Judge*

plaintiff's companion turned back, but plaintiff kept on. In his efforts to avoid striking her, Bingheim turned his truck sharply to the left, running into the north curb of Union Avenue a short distance east of Seventh Street. Plaintiff collided with the right rear wheel of said truck and received the injuries, to recover for which his suit is being prosecuted.

The evidence on the part of plaintiff is to the effect that just prior to and at the time of the accident, Bingheim was driving said truck at a speed of from fifteen to twenty miles per hour. He himself testified that he was running about fifteen miles per hour, but the two boys that were riding with him both testified that he was running from fifteen to twenty miles per hour.

Suit was instituted by plaintiff, through her father as next friend, to recover for said injury. A trial was had, resulting in a verdict and judgment in favor of defendant. To reverse said judgment, this writ of error is prosecuted.

The principal ground relied ^{on} for a reversal of said judgment is the giving of two instructions on behalf of defendant. The first instruction complained of is as follows:

"The Court instructs the jury that the plaintiff has alleged in her declaration that at and immediately before the time of her injury she was in the exercise of due care and caution for her own safety. This is a material allegation and must be proved by the plaintiff by a preponderance of the evidence; and if you believe from the evidence that the plaintiff was not in the exercise of due care and caution for her own safety at and immediately before the time of her injury, that is, such care and caution as one of her age would be expected to exercise, then you must find the defendant not guilty."

This instruction required plaintiff to prove that she was in the exercise of due care for her own safety. The court clearly erred in the giving of this instruction, as under the law of this state a child under seven years of age is not required to allege or

prove due care in order to recover for an injury. Chi. City Ry. Co. v. Tuohy, 196 Ill. 410-422; McDonald v. Spring Valley, 285 Ill. 52; Morrison v. Flowers, 308 Ill. 189.

Counsel for defendant practically concede, both in their written brief and argument and on the oral argument of said cause, that said instruction did not state a correct principle of law. The only excuse offered for the tendering of said instruction is that plaintiff, in each count of her declaration, alleged that just prior to and at the time of the accident she was in the exercise of due care for her own safety. Even though said declaration contained an averment of due care, it did not render the giving of said instruction proper. The law is that an averment in a declaration, not necessary to be proven in order to constitute a cause of action, may be regarded as surplusage. E. St. L. Cen. Ry. Co. v. Altgen, 210 Ill. 213-217; L. S. & M. S. R. Co. v. Hundt, 140 Ill. 525.

The other instruction complained of is:

"The Court instructs the jury that the driver of an automobile has the right to assume that travelers on the street will not suddenly place themselves in front of such automobile, and in a place of danger; and, if you believe from the evidence that the plaintiff, on the occasion in controversy, suddenly ran or placed herself in front of defendant's automobile, at a point so close in front thereof that the driver of such automobile could not, by the exercise of ordinary care, avoid striking her, then you should find the defendant not guilty."

The giving of this instruction was erroneous for the reason that all the defendant was required to prove to be entitled to a verdict of not guilty was that at the immediate time of the accident, the driver of said truck exercised due care and caution to avoid said injury, leaving entirely out of account the fact that, just prior thereto, he may have been violating the law in driving said truck at a high and dangerous rate of speed.

Counsel for the defendant argue strenuously that, notwithstanding the error in the instruction with reference to due care on the part of the plaintiff, the evidence wholly fails to show any negligence on the part of the driver of said truck; that while the evidence tends to show that he was driving said truck at from fifteen to twenty miles per hour, that the speed of the truck had nothing to do with the causing of the accident.

There is a conflict in the evidence as to where the driver of the truck was at the time he first saw the plaintiff. He himself testified that he was within about six feet of plaintiff when he first saw her--by that answer he evidently meant after she had run into the street, as he previously testified that he saw both of the little girls on the sidewalk. Arthur Minor, one of the young men who was riding with Bingheim on said truck, testified: "We were about 25 or 30 feet away from the girl when Bingheim hollered." Bingheim testified that when he saw the girl he used both of his hands to turn the truck to the left and that he did not sound his horn for that reason, but that he "hollered" at her. It was therefore a question for the jury on the evidence as to whether, if Bingheim saw plaintiff when he was from twenty-five to thirty feet away from her, he should, in the exercise of due care, have been able to stop his truck in time to avoid injuring her.

Counsel for the defendant cite *Rack v. Chi. City Ry. Co.*, 173 Ill. 289-294, to the effect that the mere presence of children on the sidewalk does not make it the duty of a person driving in the street to stop his vehicle or slow it down, unless there is something to indicate a likelihood that the children are about to run into the street. This case no doubt states a correct principle of law, and applies to a driver who is driving his car at a speed which would not be excessive, taking into account the traffic and use of the way. In *Morrison v. Flowers*, *supra*, the court in discussing a question of this character at page 197 says:

"When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for the operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury; but if one is running his automobile at a speed in excess of the statutory limit or at an unreasonable or dangerous speed, he cannot escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was then unavoidable. (Huddy on automobiles, --5th ed.--sec. 419; 14 A. L. R., 1176.)"

There is also evidence in the record tending to prove that just prior to the accident in question, as said truck was proceeding along said street, the driver thereof was in conversation with the two young men who were riding with him. One of them testified: "We were talking with Bingheim from the time we got in until we got to the back of the wagon. After seeing the girl there wasn't any more conversation."

Without further discussion of the evidence in the case, and without expressing any opinion as to the weight of the same, we are unable to say as a matter of law that there is no evidence in the record fairly tending to prove negligence on the part of the defendant. This being true, we feel compelled to reverse said cause for the giving of the two instructions above set forth, as the giving of the same constitutes reversible error on this record.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported.

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fendant, we feel compelled to reverse said decree
in the case.

On this record,

Reversed and remanded.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1925.

238 A. 653

E. V. RINNEY,

Appellee,

vs.

SOUTHERN RAILWAY COMPANY,
a Corporation,
Appellant.Appeal from the
City Court of
East St. Louis,
Illinois.

OPINION by BOGGS, J.

An action on the case was instituted by appellee in the city court of East St. Louis against appellant, seeking to recover for an injury alleged to have been sustained by appellee while engaged in his duties as a lamplighter for appellant company.

The declaration consisted of one count, and alleged among other things that on and prior to November 15th, 1922, appellee and appellant railroad company were both engaged in interstate commerce; that on said 15th day of November, appellant had left two barrels of oil upon its right of way, which it was the duty of appellee to place in an oil house located a short distance from said track; that the oil in said barrels was for the exclusive use and purpose of replenishing the switch lamps along appellant's main switch tracks; that appellee, while in the exercise of due care for his own safety, was attempting to remove one of said barrels, and was struck by a piece of timber projecting from a box car in a train moving on a side track of appellant railroad; that by reason of said injury his right leg was fractured between the hip and knee joint; alleging damages, etc.

To said declaration, appellant filed a plea of not guilty. a trial was had, resulting in a verdict in favor of appellee for \$20,000.00. On motion of appellant, said verdict was set aside and a new trial was had, resulting in a verdict in the sum of \$5,000.00,

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Kramer, Kramer & Campbell - Attys for Appellant
 Casley & Galt - Attys for Appellee
 Hon. Jm. S. Bond - City Judge

which verdict was sustained by the trial court, and judgment was rendered thereon. To reverse said judgment, this appeal is prosecuted.

Among other things, it is contended by appellant for a reversal of said cause that appellee was not engaged in interstate commerce at the time of said injury.

The record discloses that appellee was in the employ of appellant as a lamplighter, and that in the performance of his duties as such, he had the care of some 122 oil lamps, located over a distance of some four miles along the two main and side or switching tracks of appellant railroad. It was the duty of appellee to clean the globes, fill up any empty lamps that he might find, and keep said lamps in proper condition. The oil used to fill the lamps was taken from barrels that were stored in said oil house. Said barrels were filled about once a month, and it was while attempting to place one of said barrels, so left by appellant company, in the oil house, that appellee claims he was injured.

We are of the opinion and hold that if appellee was injured while attempting to remove one of said barrels to said oil house, he was engaged in interstate commerce, or in work so closely connected with interstate commerce as to be a part of it. (Staley v. I. C. R. Co., 268 Ill. 356; C. & A. R. Co. v. Ind. Com. 288 Ill. 60306II; Eneary v. C. I. T. Co., 306 Ill. 392-396; Erie R. Co. v. Collins, 53 U. S. 77-85; Erie R. Co. v. Szary, 253 U. S. 66-90; S. P. R. Co. v. Acc. Com. of Ill., 251 U. S. 259.)

It is also contended by appellant that appellee can not recover in this case for the reason that as an employe of appellant company, he assumed the risks of his employment, and that the alleged injury arose out of the character of risk which appellee as such employe assumed.

We are of the opinion and hold that this point is not well taken. Appellee only assumed the ordinary risks incident to his labor, and this was not such a risk. The employee assumes only those risks

that are known to him, and the dangers of which he appreciates. (Gila Valley R. Co. v. Hall, 232 U. S. 94-102; Gen. Vt. R. Co. v. White, 238 U. S. 507-510.) The law further is that under the Federal Employers' Liability Act, an employee does not assume the risk of injury from the negligence of co-employees. (Devine v. C. R. I. & P. R. Co., 185 App. 488-495; Maddox v. C. & A. R. Co., 187 App. 536; Pa. R. Co. v. Galvin, term 67, ag. 38, opinion filed in this court at the March term, 1924; C. & C. R. Co. v. Deatley, 241 U. S. 310-315.)

The principal ground, however, urged by appellant for a reversal of the judgment in this case is that the verdict of the jury is against the manifest weight of the evidence.

The evidence on the part of appellee is to the effect that on November 15th, 1922, he was standing about two or three feet from appellant's track, and was bending over, attempting to place the in the bunghole of one of the barrels above mentioned, when he was struck by a piece of timber projecting from a passing train of cars on appellant's track. He testified that he was knocked down, and upon rising from the ground, he saw a of timber, two by four or four by four, projecting some six feet from a side door in a box car in said train, at an angle of about 20°; that said timber struck his leg above the knee; that though he experienced great pain, he was able to roll said barrel into the oil house and lock the door. He further testified that he secured a piece of board which he used as a crutch, and hobbled to his home, some three-fourths of a mile distant, whereupon he took his bed and was not able to work until some time in March, 1923, being for some three months. There was no eye-witness to the accident, and no one testified on behalf of appellee as to the manner in which he received his injury.

On the part of appellant, Dr. I. S. Foulon testified that on the afternoon of November 15th, appellee came to his office, complaining of a pain in his hip and leg, which he called rheumatism, and after an examination and a flexing of the leg, he diagnosed ap-

appellee's trouble as sciatic rheumatism; that there was no fracture of appellee's leg at that time and no indication of any injury thereto. This witness further testified that a person with an injured or fractured femur could not have stood the examination which he gave appellee, and that he could not have walked with such an injury.

Dr. Z. S. Foulon, who was associated with I. S. Foulon, testified that on November 18th, 1922, he was called to the residence of appellee, and that appellee complained of "a terrible pain in his hip joint, extending downward toward the foot." This witness testified: "I asked him if he had been hurt and he said no. He was asked, 'Did you fall?' He answered, 'No, what I think caused this is carrying those doggon 5-gallon cans of oil; I think I strained my leg.'" The doctor further testified that he rotated the foot and raised the foot and placed the patient's leg on his abdomen; that this examination could not have been conducted had the femur been fractured. This witness further testified that he was appellee on the 24th and 30th of November, and the 4th of December; that on each occasion he examined his leg, and that no fracture then existed; that on December 9th he was called to the home of appellee and found that the femur bone in appellee's right leg was broken between the second and third portions of the thigh; that appellee told him that during the night he had gotten up from bed, lost his balance and fell, hitting his leg against the edge of the bedstead, and that he heard a crack. The doctor further testified that he placed appellee's leg in a splint, in which it remained about seven weeks; that upon removing the splint, he found a lump and callus formed around the broken bone; that Dr. Wiggins was called in consultation and an X-ray was taken of the leg, which disclosed a cancerous condition of the bone, and that the condition as there disclosed by said X-ray picture was a matter that had been developing for several months prior thereto.

One Charles F. Bovinett testified on behalf of appellant that on several occasions before the day in question, appellee com-

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plained of pain in one of his legs. Mrs. Bovinett, wife of Charles F. Bovinett, testified that she was at the home of appellee, and that appellee said to her "mamma let me down on the bed--I was out of the bed--and when she let me down on the bed they heard a crack and the leg broke and they got me back in bed."

John Fritz testified that on March 4th, 1924, he met appellee and asked what was the matter with him, and that the latter stated a barrel of oil fell on his leg. William Buchanan testified on behalf of appellant that in October, 1922, appellee stated to him that his leg was hurting him awfully bad. One Charles A Deale testified about the middle of November, 1922, appellee told him that one day he was rolling a barrel of oil into the oil house, and the barrel slipped and hit him on the leg. Mrs. Christina Blake testified that in November, 1922, appellee complained he had rheumatism and was disabled and couldn't do work like they expected of him.

Appellee testified that the timber which struck him stood at an angle of about 30°, and that he was standing some three feet from the rail of appellant's track. The record discloses that the side of the car extended out two feet and two inches beyond the rail of the track, and the floor of an ordinary box car is some three feet and ten inches above the top of the rail. Appellee was not standing on the rail, but below the top of the rail, so it would seem physical impossibility for the injury to have occurred in the way appellee testified that it did.

It was also contended by appellant that the court erred in refusing to allow the court reporter to give in evidence what appellee had testified to on the former trial of said cause, with reference to the date on which he claims to have been injured. The objection was sustained to the question, on the ground that no foundation had been laid for the question. We are of the opinion and hold that a party to the suit may be examined with reference to statements that he has made at other times and places, and that the

testimony he has given on former trials may be admitted without laying the foundation therefore as is done with the ordinary witness. (Stump v. Dudley, 235 Ill. 46-47; Brown v. C. & R. R. Co., 125 Ill. 605; McCoy v. People, 71 Ill. 111; Radeleff v. Radeloff, 27 App. 572.) We therefore hold that the court erred in said ruling.

It was also contended by appellant that the court erred in making certain remarks in connection with the testimony that had been given by the physicians who had testified in the case. While it is not proper for the trial court, in the presence of the jury, to state his version of the testimony given by a witness, still in this case no substantial injury was done appellant by such remarks, especially in view of the fact that the court instructed the jury to disregard them.

It is also contended by appellant that the court erred in giving the second instruction given on behalf of appellee, being an instruction which undertook to state to the jury the law governing the measure of damages appellee would be entitled to recover in the event they should find the issues in his favor. The giving of this instruction was erroneous, in that it fails to instruct the jury as to the effect appellee's contributory negligence would have, if any, in mitigating the amount of his damages. Burns v. Jackson, 224 App. 519; Comer v. Borders Coal Co., 246 Ill. 451; Hall v. Vandalia R. Co., 169 App. 12; Bradley v. Vandalia R. Co., 206 App. 519; Houchens v. St. L. B. & P. R. Co., 221 App. 140.)

Appellant also contends that the court erred in refusing to give the two instructions offered by it and which were refused. We have examined these instructions, and are of the opinion that, insofar as the same state correct principles of law, they are covered by other instructions given on behalf of appellant.

It is also contended by appellant that the record fails to sustain the charge of negligence, and that the court should have directed a verdict for appellant. As we have already stated, we are

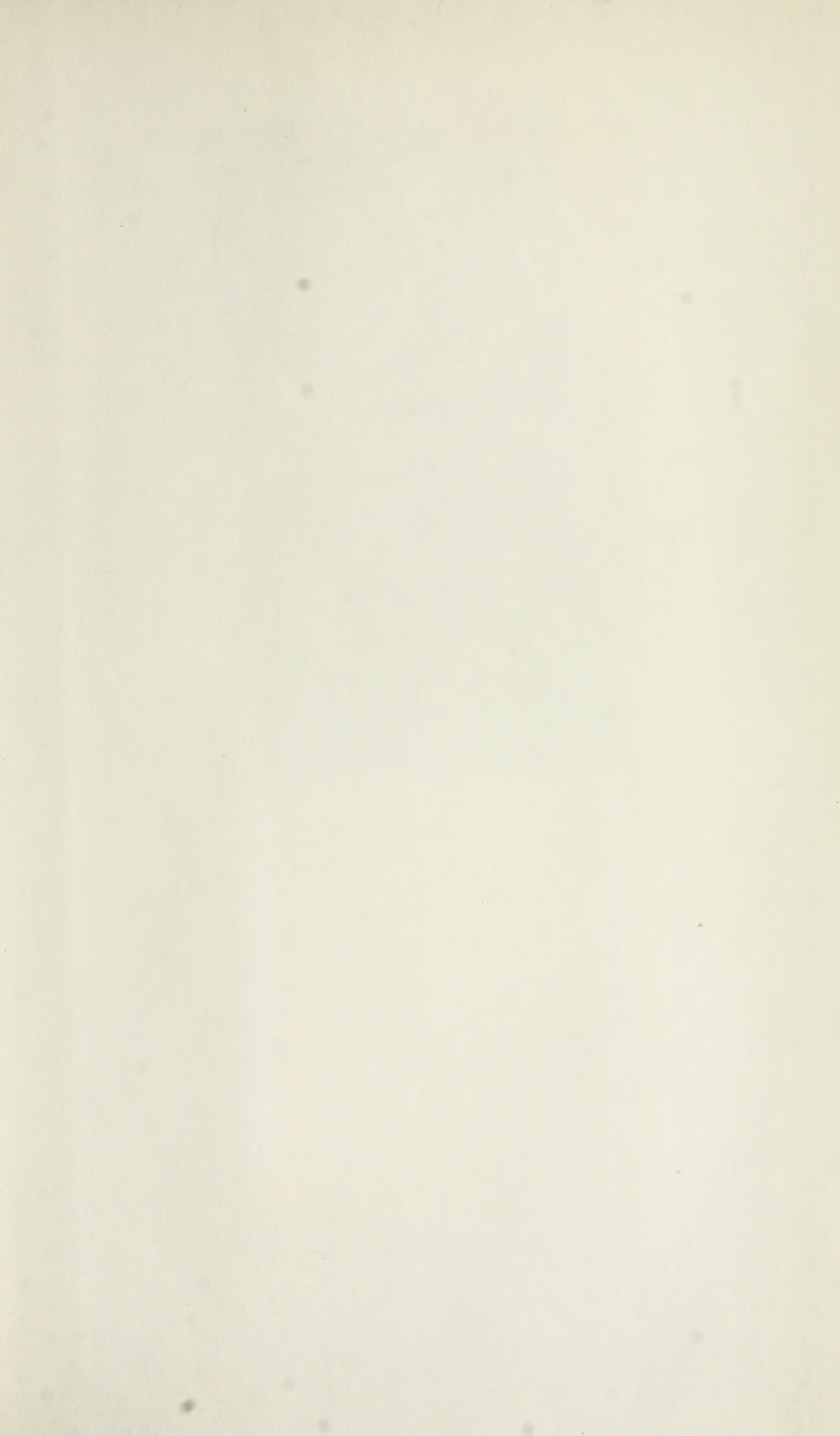
of the opinion that the verdict of the jury is against the manifest weight of the evidence, and that the physical facts in connection with the alleged injury are against the theory advanced by appellee. However, we are not able to say that there is no evidence in the record tending to shew negligence on the part of appellant, and we would not therefore be justified in reversing said cause without remanding. (Mirich v. Forschner Contracting Co., 312 Ill. 343.)

It is also contended that appellee was guilty of contributory negligence, and that therefore there was no right of recovery on his part, for the reason, as appellant claims, that appellee was not engaged in interstate commerce at the time of receiving said injury. We have already held that the evidence in the record supports the verdict of the jury finding that appellee was engaged in interstate commerce. That being true, appellee's negligence, if he was negligent, would not be a bar to his right of recovery, but would only be taken into consideration in mitigating or lessening the amount of his damages, if otherwise entitled to recover.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported.



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